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No. 85-656-AFX
Status: GRANTED

Docketed:
October 15, 1985

Title: Ralph Munro, Secretary of State of Washington, Appellant
v.
Socialist Workers Party, et al.

Court: United States Court of Appeals for the Ninth Circuit

Counsel for appellant: Johnson, James M.

Counsel for appellee: Smith, Daniel Hoyt

Entry	Date	Note	Proceedings and Orders
1	Oct 15 1985	G	Statement as to jurisdiction filed.
3	Nov 1 1985		Order extending time to file response to juriscictional statement until December 15, 1985.
4	Dec 18 1985		DISTRIBUTED. January 10, 1986
5	Dec 23 1985	X	Motion of appellees Socialist Workers Party, et al. to dismiss or affirm filed.
6	Jan 13 1986		PROBABLE JURISDICTION NOTED.
			**********
7	Feb 18 1986		Record filed.
9	Feb 24 1986		Order extending time to file brief of appellant on the merits until March 7, 1986.
10	Mar 11 1986		Brief of appellant Ralph Munro, Sec. of State filed.
12	Apr 5 1986		Order extending time to file brief of appellee on the merits until April 30, 1986.
13	Apr 12 1986		Brief amicus curiae of ACLU, et al. filed.
14	Apr 28 1986		Brief amicus curiae of Libertarian Party of Washington filed.
15	May 2 1986		Brief of appellee Socialist Workers Party filed.
16	May 19 1986		Joint appendix filed.
17	Jul 15 1986		CIRCULATED.
18	Jul 28 1986		SET FOR ARGUMENT. Tuesday, October 7, 1986. (2nd case). (1 hour).
19	Sep 27 1986	X	Reply brief of appellant Ralph Munro, Sec. of State filed.
20	Oct 7 1986		ARGUED.

85-656

No.

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1985

Secretary of State of the State of Washington,
RALPH MUNRO,

Appellant,

v.

SOCIALIST WORKERS PARTY, ET AL.

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

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October , 1985

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

QUESTION PRESENTED

Is the State of Washington's statutory requirement that a candidate for partisan office must receive 1% of the votes cast for that office in the primary election[1] in order to appear on the general election ballot a violation of the First and Fourteenth Amendments to the United States Constitution?

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[1]Washington has a "blanket primary", in which each primary ballot includes all parties and candidates, and each voter may vote for any candidate. There is no party registration of voters in Washington.

PARTIES

Appellant Ralph Munro is the Secretary of State of the State of Washington. Appellees are the Socialist Workers' Party and Louise Pittell, LeRoy Watson and Dean Peoples, identified in the Complaint as Washington voters, members and a candidate of that party.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 765 F. 2d 1417 (1985) and reproduced as Appendix A.

The opinion of the United States District Court, Western District which is unreported is reproduced as Appendix C.

JURISDICTION

This appeal is taken from an opinion and judgment of the Court of Appeals for the Ninth Circuit which held unconstitutional Wash. Rev. Code 29.18.110 but only with

reference to statewide offices. That Washington election statute requires a candidate for partisan office to receive 1% of the votes cast for that office in the primary election to appear as a candidate on the general election ballot six weeks later.

The Court of Appeals reversed a decision of the District Court for the Western District of Washington which had rendered a Summary Judgment upholding the 1% requirement.

Jurisdiction of the district court was invoked pursuant to 28 U.S.C. 1331, 1343 and 1357. Jurisdiction of the Court of Appeals was exercised under 28 U.S.C. 1291.

The Court of Appeals judgment was entered 17 July, 1985 and is appended (App. B). No rehearing was sought.

A notice of appeal was filed in the Court of Appeals on 8 October 1985 and is appended (App. E). Jurisdiction in this Court is conferred by 28 U.S.C. 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 4 of the United States Constitution:

> §4 ELECTION OF SENATORS AND REPRESENTATIVES. The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; * * *

First Amendment of the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacibly to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, § 1 of the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Rev. Code 29.18.110 reads as follows:

> No name of a candidate for a partisan office shall appear on the general election ballot unless he receives a number of votes equal to at least one percent of the total number cast for all candidates for the position sought: *Provided*, That only the name of the candidate who receives a plurality of the votes cast for the candidates of his party for any office shall appear on the general election ballot.

STATEMENT OF THE CASE

A. Introduction—The State of Washington's Election System:

The state of Washington conducts its election system with a greater opportunity for participation by independent candidates and minor party candidates than most other states' systems. Such candidates can be nominated by a small number of voters[2] and then appear on the September blanket primary election. For any candidate to appear on the November general election ballot, the candidate must have received at least 1% of the vote cast for the office at the September election. It is that 1% requirement which the court below invalidated, but only with reference to statewide offices.

The election process in Washington formally commences with the filing of declarations of candidacy, in the third week of July. The next step is the primary, which is held the third Tuesday in September (Wash. Rev. Code 29.13.070). The third and final step is the general election on the first Tuesday after the first Monday in November (Wash. Rev. Code 29.13.010). Thus the time between these two elections is six to seven weeks.

---

[2]For the 1986 and 1988 elections, only 194 are required for a statewide office in a state with a population of approximately 4.3 million.

Washington's primary election is a "blanket" primary. That is; the voters are not required to register by political party or select a party ballot. Washington voters at the primary election are thus not confined to voting for the candidates of just one political party but instead may vote for *any* candidate for *any* office on the ballot. But the voter can, of course, only vote once for each office. Thus, he or she can vote, in the same primary election, for a Republican candidate for the U.S. Senate, a Socialist Worker candidate for the U.S. House of Representatives, a Democratic Governor, and so on down the ballot.

B. **Qualifying For The Election Ballot.**

Candidates for partisan office on the September primary ballot are either "major party", "minor party" candidates or "independents".

A party qualifies as a "major party", if one of its candidates has received at least 5% of the total vote for any statewide office in the previous general election (Wash. Rev. Code 29.01.090). All other parties are classified as "minor".

Those wishing to run for office as major party candidates are placed on the September primary if they file a declaration of candidacy, and indicate their party and the office they seek. (Wash. Rev. Code § 29.18.020-030). Those wishing to run for office as minor party candidates must utilize a convention process.

A minor party forms itself and nominates candidates, to be placed on the same September primary ballot, through the convening of a 'convention'. That convention, which takes place in late July or early August must be attended by one voter for each 10,000 persons who voted in the last presidential election in the district or jurisdiction in question (Wash. Rev. Code 29.24.030). This means, for example, that only 194 voters need attend a convention of a minor party to nominate a candidate for statewide office in Washington, based on the 1984 presidential election.[3]

[3]The statewide number was 178 during the years the case below was under litigation, based upon the 1980 presidential election.

Independent candidates are nominated also through the same convention process. However, the convention for independent candidates, rather than forming a party, has as its sole function the nomination of the candidate.

All the candidates for partisan office, be they major party, minor party, or independent candidates, are then placed on the September primary ballot (Wash. Rev. Code 29.18.020) along with candidates for any nonpartisan offices.

After the primary, only those candidates who receive 1% of the vote for that office in the primary will remain on the general election ballot, be they major party, minor party, or independent candidates. (Wash. Rev. Code 29.18.110). As previously indicated, it is this requirement which the court below held unconstitutional, as applied to minor party candidates for statewide office.

The foregoing has been Washington's election system since 1977. Prior to that, "minor" party candidates bypassed the September primary election.[4] However, the convention utilized to select minor party candidates was required to be held on the same day as the September primary, and the convention participants had to forego the opportunity to vote in that primary election. The candidates selected by that convention were automatically placed on the November general election ballot.

C. **Participation of Minor Parties and Independents Under the Washington System.**

Since the 1977 change in Washington election laws, the number of minor parties and independent candidates (for statewide and non-statewide offices combined) appearing on the September primary election and the November general election have been as follows:

[4]Before 1977, candidates on a primary were required to receive 5% of the votes to remain on the ballot for the general election. That requirement did not affect minor party candidates who were not then on the primary ballot.

	September Primary/ Minor Party Candidates	September Primary/ Independent Candidates	November General/ Minor Party Candidates	November General/ Independent Candidates
1978	11	2	8	2
1980*	11	2	8	2
1982	13	5	12	5
1984*	11	5	9	4

*The 1980 and 1984 figures do not include Presidential candidates who only appear on the November general election ballot. In 1980 there were nine presidential candidates and ten in 1984.

The foregoing illustrates that minor party candidates and independents have enjoyed considerable success in having candidates on the state election ballots, *and* also in qualifying for inclusion in the November general election. That success has been somewhat less with respect to the statewide offices, as contrasted with non-statewide offices. In the November general election, the 1% for qualification to appear on the ballot required from 7,700 to 9,140 votes[5] related to the votes cast for the various statewide offices in 1980. The number varies because of a fall-off from the number of votes cast for Governor down to the considerably fewer votes cast for Commissioner of Public Lands).

The Supervisor of Elections statement with respect to that success was that:

> The Socialist Workers Party, Libertarian Party, and Free Peoples Party have had little difficulty meeting the requirements for formation of a party and little difficulty placing candidates for congressional and legislative office on the state general election ballot, but they have not been successful at qualifying candidates for the state general election ballot for statewide offices, such as U.S. Senate.

Affidavit of Donald F. Whiting, Exhibit A, p. 5.[6]

[5]Based on Washington's last primary election.

[6]Quoted only in part by the court below. See, App. A-4.

In the 1984 election which immediately preceded oral argument in the Circuit Court, sixteen minor and independent candidates appeared on the September primary. Thirteen qualified for the November general, including the socialist Workers' candidate for United States Congress.[7]

D. History of This Litigation

Elections were conducted in Washington pursuant to this system since 1977 except for a special situation in 1983. On September 1, 1983, one of Washington's U.S. Senators died and the legislature in a special session created a special October primary for that office, it being too late to incorporate the election of that office into the September primary election. The Socialist Workers Party held a convention and chose Appellee Peoples as its candidate. He was the only minor party or independent nominee in that senatorial election process. Mr. Peoples appeared on the special October primary ballot along with the numerous major party nominees. At the special October primary election he received only 596 votes (less than 1/10 of the required 1% of the 681,690 total vote cast). Thus he was not included on the November general election ballot.

The Socialist Workers Party then filed the instant action in federal district court challenging the constitutionality of Wash. Rev. Code 29.18.110, which contained the 1% primary vote requirement to appear on the general election ballot. The challenge was recited to be based primarily on the First and Fourteenth Amendment. The district court denied relief, and ultimately granted summary judgment to the State, thus upholding the constitutionality of the Washington election system and the 1% requirement in particular.

On appeal, the Socialist Workers Party continued it's challenge to the 1% requirement on the same constitutional grounds. The circuit court below found the 1% requirement to be constitutionally invalid for statewide

[7]A supplement (to the record) was filed (Certificate of the Secretary of State).

offices on the grounds urged by the Party, and reversed the District Court.

The court below held Wash. Rev. Code 29.18.110 unconstitutional for statewide offices because it found that the 1% requirement contained therein:

> * * * deprives minor parties of a reasonable chance to place candidates on the ballot, and thus deprives citizens of Washington of the opportunity to organize, campaign and vote outside the framework of the dominant political parties. * * *

Appendix A-9.

The circuit court viewed the 1% requirement as bringing about "* * * the virtually complete exclusion of serious-minded minor parties* * *". Appendix A-8. After so viewing its effect, the court found that requirement to be a violation of the First and Fourteenth Amendments.

THE FEDERAL QUESTION IS SUBSTANTIAL

A. **Introduction**

The issues presented by this appeal are substantial. Washington asserts the right of a state to regulate its primary and election process through an election system designed to balance a number of competing and legitimate interests.

This Court has identified the major interest which the Petitioner here asserts and which the court below has erroneously disregarded.

> The State has the right to require candidates to make a preliminary showing of substantial support, to qualify for a place on the ballot, bacause it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates.

Anderson v. Celebrezze 466 U.S. 780, 788 (1983).

And as stated in *Jenness v. Fortson*, 403 U.S. 431, 442 (1971):

> There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.

In striking down Washington's effort to require, through its preliminary 1% requirement, "some showing of a significant modicum of support", the court below has completely upset the balance which this Court's decisions have allowed other states to strike.

What the Socialist Workers Party is actually asserting is a virtually unrestricted access to the general election ballot without any preliminary showing of a modicum of support in the primary. And the court below gave the party exactly that, at least with respect to state-wide offices. Further, the court below has reduced the right of a State to require such a preliminary showing to an empty shell. If the exercise of that right has the effect of actually limiting the number of minor party candidates in the general election to a significant extent, then that right is lost to the State, never to be regained. And this is so regardless of whether or not the parties which fail to qualify their candidates for the general election have been "reasonably diligent" in trying to do so. *Storer v. Brown*, 415 U.S. 724, 742 (1974).

The court below has effectively held, as a matter of federal constitutional law, that requiring a specified showing of voter support in the primary election to screen candidates from the general ballot is unlawful. Though the statute in question was 1%, the Circuit Court's analysis appears to extend to any threshhold percentage which has the intended effect of screening out candidates with *de minimis* support. Both the result and the basic approach of the court below should be reviewed by this Court.

B. **The Purpose and Effect of the 1% Requirement**

Under Washington's election system, a minor party which wishes to run a candidate in a state-wide election is virtually guaranteed access to the State's voters. All it

needs to do is obtain the attendance of a handful of registered voters at its convention, with the result that the candidate will be automatically placed on the primary ballot. What is not guaranteed, however, is the right of a second chance, through automatic placement on the general election ballot. That second chance can be obtained only by meeting the 1% requirement.

A party could fail to meet this 1% requirement and thereby fail to gain a "modicum of support" for several reasons. One may be that the party and its candidate simply did not work hard enough, and thus were not "reasonably diligent" in the primary. *Storer*, *supra*, 415 U.S. at 742. Another reason may be that the voters found the party and its candidate unappealing, no matter how hard they worked to persuade the voters otherwise.

That a minor party which campaigns with reasonable diligence and fields attractive candidates can meet the 1% requirement is clear from the record in this case. As already shown, minor parties have had considerable success since 1977 in meeting the 1% requirement and thereby remaining on the general election ballot in congressional and other local races. See p. 6, *supra*. But the court below ignores this fact. Instead, it focuses solely on the fact that minor parties have had less success in state-wide races. And for this the court below condemns Washington's system, with its 1% requirement. The court gives no weight whatsoever to what are, in all likelihood, the real reasons for this lower degree of success on the state-wide level.

C. The Fundamentally Erroneous Approach Of The Court Below

Apparently because of these differing degrees of success on the state and local levels, the court below invalidated the 1% requirement only as applied to state-wide elections. As applied to races which are not state-wide, the 1% requirement remains intact. And this is so despite the fact that in the Complaint which commenced this action, and in the Respondents' brief in the court below as well, the 1% requirement was challenged on its face, i.e., as applied to any and all elections, be they state-wide or not.

Thus Washington may no longer have a single, uniform standard for both state-wide and local elections.[8] This is a situation which is itself subject to serious constitutional challenge. See *Illinois Board of Elections v. Socialist Workers Party*, 440 U.S. 173, (1979). If the decision below stands, Washington can remedy this situation only by giving up, for local elections, a requirement which is itself perfectly acceptable under the First and Fourteenth Amendments.

Such a result is absurd; but it simply highlights the absurdity of the approach used by the court below in its application of historical data—an approach which in effect says: "If the 1% requirement has any substantial effect, then it will be held to be unconstitutional."[9]

In addition to its misuse of history, the court below completely ignored several critical features of Washington's system. The first is the nature of a "blanket" primary. In States with either an "open" or a "closed" primary, the voter selects candidates from only one party. For a party which does not field an entire slate of candidates, for all offices, this would present to the voter a strong incentive to avoid that party's candidates completely. For if he chooses that party, he thereby precludes himself from voting for candidates for all offices.

At least in Washington, minor parties typically do not field an entire slate. The Socialist Workers Party in 1984 provided a striking example of this—it placed on the pri-

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[8]On remand, the district court entered a judgment for plaintiffs (appellees here) pursuant to the Circuit Court decision.

[9]The absurdity can perhaps be best illustrated by an example. Assume two states, A and B, each having an election system identical to Washington's. Assume also that over a given period, e.g., 10 years, during which that system was in place, minor party candidates were on primary ballot twenty times in each state. But also assume that for whatever reason, only two of the candidates survived to the general election in State A, while in State B only two *failed* to survive to the general election. The 1% requirement would be constitutionally acceptable to the court below for State B, but invalid for State A. But such differing results would be, we suggest, constitutional nonsense, though they would be required by the approach of the court below.

mary ballot a candidate for governor and a candidate for one congressional position, but none for any other positions. If Washington had "open" or "closed" primary, the voter wishing to elect the Socialist Workers' candidates for Governor and for Congress would be precluded from selecting candidates for any other positions. This would obviously be a strong incentive to refuse to vote for the Socialist Workers' candidates at all; and that incentive, in turn, would make the 1% requirement much more difficult for the candidates to meet. But in Washington's blanket primary, no such incentive to avoid minor party candidates exists. Every voter in the primary election can vote for Socialist Workers' candidates without fear of tossing away his opportunity to select candidates for other positions.

This feature of the Washington system, along with others, was ignored by the court below in its efforts to distinguish *Jenness v. Fortson*, 403 U.S. 431 (1971) and *American Party of Texas v. White*, 415 U.S. 767 (1974), the principal cases on which we rely.

In *Jenness*, this Court approved a Georgia system which required independent candidates seeking a place on Georgia's general election ballot to gather nominating petitions signed by 5% of the registered voters in the last election for the office being sought. In *American Party*, the Texas system there approved was similar, though the required percentage was only 1%.

The following table compares the Georgia and Texas systems with Washington's, using 1984 Washington voter figures for the Governor's race.

Total Washington Voters	Washington/General Vote For Governor	Washington/ Primary Vote for Governor
2,457,667	1,888,987	914,000
x 5% Approved in Jenness	x 1% Approved in American Party	x 1% (invalidated) by court below
122,883	18,890	9,140

Yet the court below called Washington's 1% requirement "more difficult to meet". App. A-8. Why the 9,140 primary votes called for under Washington's 1% requirement would be more difficult to obtain than the 122,883 called for under *Jenness* or the 18,890 called for under *American Party* is baffling. But the court below did not shrink from justifying its conclusion that such was the case.

It emphasized that "* * * a primary vote system for a minor party nominee has the inherent effect of establishing a relatively early deadline", thereby preventing independent-minded voters from basing their choice on subsequent events. App. A-8. But this completely overlooks the fact that the deadlines for gathering signatures under the Georgia and Texas systems were much *earlier* than the deadline established by Washington's primary election. In *Jenness*, the deadline was the second Wednesday in June. See 403 U.S at 434, 435. In *American Party*, it was the 30th of June. See 415 U.S. at 778. In Washington, it is the third Tuesday of *September*.

The court below also emphasized that under the Georgia and Texas systems, the necessary signatures could be obtained from any registered voters, regardless of whether those votes participated in another party primary or not. App. A-8. But this is simply pointing out what is really a similarity with Washington's system, not a difference. Washington's blanket primary allows similar flexibility and openness to the potential supporters of minor party candidates, for the reasons previously explained. See, pp. 11-D, *supra*.

Lastly, the court below faults the Washington system because the 1% requirement can be satisfied only by persons who actually vote in the primary, rather than by registered voters generally. App. A-8. But this problem, if it can actually be called a problem, is self-correcting. To the extent that the voter turnout in the primary decreases, to that same extent the number of votes under the 1% requirement decreases as well.

By failing to follow *Jenness* and *White*, the court be-

low denied to Washington the flexibility enjoyed by other States in establishing the modicum of support to be required of minor party candidates who wish to be placed on the general election ballot.

CONCLUSION

For the reasons given above, probable jurisdiction should be noted.

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INDEX TO APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-3806

D.C. No. CV 83-697T

OPINION

Socialist Workers Party; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES, *Plaintiffs-Appellants,*

v.

Secretary of State of the State of Washington, RALPH MUNRO, *Defendant-Appellee*

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding
Argued and Submitted December 3, 1984 —
Seattle, Washington

Before: BROWNING, Chief Judge, GOODWIN and SKOPIL, Circuit Judges.

BROWNING, Chief Judge:

Plaintiffs filed suit challenging the constitutionality of Wash. Rev. Code section 29.18.110 (West Supp. 1985) on the ground that it effectively barred minor parties from participating in general elections for statewide office and thus deprived these parties, their members, and the voters of Washington of rights protected by the first and fourteenth amendments. Both parties filed motions for summary judgment. The district court gave judgment for defendants. Plaintiffs appealed.

I

Prior to 1977, minor political parties did not participate in Washington's primary election. Each minor party nominated its candidates for public office at a convention, at-

tended by at least one hundred registered voters. Wash. Rev. Code §§ 29.24.020 and 29.24.030 (1965) (amended 1977). The minor party nominee was placed on the ballot for the general election upon the filing of a certificate signed by at least one hundred registered voters present at the party's convention. Wash. Rev. Code §§ 29.24.040 and 29.30.100 (1965) (amended 1977).

Washington amended its election law in 1977. The convention-certificate requirement for nomination of a minor party candidate is retained, but an additional condition is imposed upon minor party access to the general election ballot. The name of the nominee selected by a minor party by the convention-certification procedure is no longer placed directly on the general election ballot but instead is placed on the ballot for the state's primary election. Wash. Rev. Code § 29.28.020 (West Supp. 1985). The primary ballot also includes the names of those persons who have declared their candidacy for nomination by the major parties. The nominee of a minor party or a candidate for nomination of a major party is placed on the general election ballot only if he receives 1% of the total primary vote for all candidates for the particular office, and a plurality of the votes cast for candidates of his party for that office. Wash. Rev. Code § 29.18.110. As a practical matter the first condition affects only minor parties because the vote cast for the two major parties has consistently far exceeded 1% of the total vote. The second condition affects only major party candidates because a minor party is permitted to place on the primary ballot only the single nominee already selected by the convention-certificate process. Wash. Rev. Code §§ 29.18.020, 29.24.020.

II.

The Supreme Court recently restated the analytic process to be followed in resolving first and fourteenth amendment challenges to state election laws:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the

> First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

We turn first to the (1) character and (2) magnitude of the injury to the first and fourteenth amendment rights plaintiffs seek to vindicate.

Plaintiffs contend the primary vote requirement imposed by Wash. Rev. Code section 29.18.110 has substantially barred minor party candidates for statewide offices from the ballot for Washington's general elections since 1977.

Statutes restricting access to the ballot by a party's candidates limit both "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). The injury to these fundamental rights is particularly serious where, as here, the burden "falls unequally on new or small political parties," for "[b]y limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas." *Anderson*, 460 U.S. at 793-94. *See also Clements v. Fashing*, 457 U.S. 957, 964-65 (1982), and cases cited.

It is evident that the infringement upon constitutional rights involved in this case is serious in character. The magnitude of the restraint — the extent to which it has inhibited minor party access to the ballot — is dramatic.

Prior to 1977, candidates of minor parties qualified for the general election ballot in contests for statewide office

with regularity. At least one minor party appeared on the general election ballot in every Washington gubernatorial election from 1896 to 1976 except 1952. Two or more minor party candidates qualified in all but two of these elections. Forty minor party candidates appeared on the general election ballot for statewide offices in the five general elections between 1968 and 1976.

The 1977 amendment to Wash. Rev. Code section 29.18.110 worked a striking change. According to the affidavit of Washington's Supervisor of Elections, since 1977 minor parties "have not been successful at qualifying candidates for the state general election ballot for statewide offices." Although one or more minor parties nominated candidates in each of the four statewide elections held between 1978 and 1983, none qualified for the general election ballot. In 1984 one of four minor party candidates nominated qualified for the general election ballot.

There is some indication that Washington's legislature simply underestimated the adverse impact of the statutory revision upon minor party access to the general election ballot. While the legislation was under consideration, the Office of the Secretary of State addressed a memorandum to the legislators stating that if the proposed legislation had been applicable to the 1976 special election, eight of the twelve parties and fifty of the sixty-five non-presidential candidates in that election would have qualified for the general election ballot. Contrary to this prediction, minor party candidates have been substantially eliminated from Washington's general election ballot.

Washington argues that three "independent" candidates qualified for the general election ballot during this period. But an election scheme that operates to exclude minor parties from the ballot is not acceptable merely because it permits independent candidates access to the ballot. "[T]he political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." *Storer v. Brown*, 415 U.S. 724, 745 (1974).

Washington argues there is no significant difference between independent and minority party candidates in Washington because Washington's single "blanket" primary includes all parties and candidates, and a voter may vote for candidates from different parties for different offices. But the mere fact that the cost of voting for a minor party candidate in Washington is less than it is in states having restricted primaries, does not refute plaintiffs' demonstration that Washington has substantially barred minor parties from the general election ballot.

Washington asserts that voters may express their preference for a minor party candidate by writing-in the candidate's name on the general election ballot. The Washington statute appears to forbid voters from writing-in the name of a minor party candidate who has failed to qualify for a place on the ballot. *See* Wash. Rev. Code § 29.51.170. In any event, the possibilityof writing-in a minor candidate "is not an adequate substitute for having the candidate's name appear on the printed ballot." *Anderson*, 460 U.S. at 799 n.26. *See also Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974).

Washington points to several features of the 1977 revision that arguably benefitted minor parties. Prior to the revision, the statute required minor parties to hold their conventions on the same day as the major party primary, forcing voters to choose between them; under the revision, minor party conventions precede the primary and, as noted earlier, primary voters may vote for a minor party candidate for an office without forgoing the opportunity to vote for candidates of other parties for other offices. In addition, Washington contends, the requirement that minor parties participate in the "blanket" primary improves the opportunity of minor party candidates to appear in candidate forums and otherwise gain public attention. These benefits are insubstantial in the face of the undisputed evidence that the revision as a whole substantially forecloses minor parties from the general election ballot. Moreover, the state does not argue the benefits it extols could not be achieved by less restrictive means.

III.

We turn to an evaluation of the interests offered by the State as justification for the burden imposed by section 29.18.110 upon minor party access to the general election ballot and "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789.

Washington relies primarily upon two interests to justify section 29.18.110: (1) "it ensures that candidates on the general ballot have sufficient community support"; (2) "it helps prevent voter confusion." These are not independent interests. A state may not require a preliminary showing of voter support as an end in itself. Denying ballot access is permissible only if and to the extent that it is necessary as a means to further other legitimate state interests, including avoidance of the voter confusion that may result from the presence on the ballot of too many or frivolous candidates. *Anderson*, 460 U.S. at 788 n.9, and cases cited.

Washington's political history evidences no voter confusion from ballot overcrowding. In the 20 gubernatorial elections in this century prior to the passage of the challenged statute, an average of 4.75 candidates appeared on each general election ballot. The trend was downward in the first 10 elections the average number of candidates was 5.3; in the last 10 the number dropped to 4.2.

No more than eight candidates for the office of Governor have ever appeared on a Washington general election ballot. The number of candidates for other statewide offices was substantially less than the number for Governor in each of the five elections for which detailed returns are included in the record (1968-1976) — no more than four minor parties appeared on the ballot for any statewide position other than governor. *Cf. Williams v. Rhodes*, 393 U.S. 23, 47 (1968) (Harlan, J., concurring) ("[T]he presence of eight candidacies cannot be said, in light of experience, to carry a significant danger of voter confusion.").

Washington's argument that the general election ballot might be confusingly overcrowded without the restriction imposed by section 29.18.110 is undercut by the state's

tolerance and even encouragement of large numbers of candidates on the primary election ballot, particularly since primary voters may vote for any of the numerous candidates for a particular office regardless of party. The primary ballot for the special election of the United States Senate in 1983 bore the names of 33 office seekers — 18 candidates from the Democratic Party, 14 candidates from the Republican Party, and the single nominee of the Socialist Workers Party. Section 29.18.110 did not reduce the clutter of candidates facing voters in the primary. Its only effect was to reduce the number of names on the general ballot from three to two.

It is also significant that Washington's 1977 ballot access law does not apply to the election of the President and Vice-President, which is typically the most crowded contest on the Washington general election ballot.

Even if there were a problem of overcrowding on Washington's general election ballot, resulting in voter confusion, the remedy adopted by Washington unnecessarily restricts fundamental liberties by "making it virtually impossible for any but the two major parties to achieve ballot positions for their candidates." *Clements*, 457 U.S. at 965 (opinion of Rehnquist, J.). *See also Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185-86 (1979); *Storer v. Brown*, 415 U.S. at 746. Such a draconian remedy was not required to protect Washington's general election ballot from overcrowding. Indeed, we can think of no state interest, and the authorities suggest none that would necessitate the virtually complete exclusion of serious-minded minor parties seeking access to the ballot.

Washington relies upon *Jennes v. Fortson*, 403 U.S. 431 (1971), sustaining a requirement that independent candidates seeking a place on Georgia's general election ballot secure nominating petition signatures of 5% of the registered voters in the last election for the office in question; and upon *American Party of Texas v. White*, 415 U.S. 767 (1974), sustaining a 1% petition requirement imposed by Texas law. Both decisions are distinguishable.

Both *Jenness* and *American Party of Texas* involved pe-

tition requirements. Washington's primary vote requirement is more difficult to meet, for two reasons. First, the focus of the primary is usually upon contested races between candidates for the nominations of the major parties, making it more difficult for the already nominated minor party office seeker to attract voter attention. More important, a primary vote system for measuring required public support for a minor party nominee has the inherent effect of establishing a relatively early deadline, preventing independent-minded voters who might be attracted to a minor party nominee from basing their choice on significant events as they develop in the course of a campaign. *See Williams*, 393 U.S. at 33; *Anderson*, 460 U.S. at 796-805; *McLain v. Meier*, 637 F.2d 1159, 1164 (8th Cir. 1980).

In addition, the burden of *Jenness*'s 5% requirement was ameliorated by the fact that "Georgia imposes no suffocating restrictions whatever upon the free circulation of nominating petitions." *Jenness*, 403 U.S. at 438. Thus any registered voter could sign a petition; he could do so even if he had signed one or more petitions on behalf of other candidates, or had participated, or later did participate, in the primary of another party. *Id.* at 438-39. Similar flexibility was afforded by the statute involved in *American Party of Texas*. As the eighth circuit pointed out, under Texas' statute "new parties are entitled to compete before the primary, to count signatures at a party convention on primary day and to make up any shortage in signatures for fifty-five days after the primary. * * *" *McLain*, 637 F.2d at 1164. Under the Washington statute, in contrast, a greater degree of support must be shown because support may be drawn only from the limited group actually voting in the primary election, excluding potential support from the 40% of the electorate that registers but does not vote.

Only Washington employs the primary device to screen minor party candidates from the general ballot. A Michigan statute similar in terms and exclusionary impact was held unconstitutional in *Socialist Workers Party v. Secretary of State*, 412 Mich. 571, 317 N.W.2d 1 (1982). The Supreme Court's earlier summary affirmance of a 3-judge

district court decision to the contrary, *see Hudler v. Austin*, 419 F. Supp. 1002 (E.D. Mich. 1976), *aff'd sub nom. Allen v. Austin*, 430 U.S. 924 (1977), dealt only with the facial constitutionality of the new Michigan procedures before any election had been conducted. The Michigan Supreme Court's subsequent decision held the statute unconstitutional as applied in light of the exclusion of minor parties from the general ballot in two subsequent elections. *See Socialist Workers Party*, 317 N.W.2d at 4-6.

The question is not whether the new Washington election law has advantages the old law did not. Instead, it is whether the present law deprives minor parties of a reasonable chance to place candidates on the ballot, and thus deprives citizens of Washington of the opportunity to organize, campaign, and vote outside the framework of the dominant political parties. The record before us demonstrates that Washington's ballot access law seriously impinges upon these protected rights. Washington has failed to present an interest substantial enough to warrant the restraint imposed on those rights. We conclude section 29.18.110 is unconstitutional as applied to statewide electoral contests.

We reverse the grant of summary judgment for Washington, and direct the district court to enter summary judgment for the Socialist Workers Party and other appellants.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-3806

CV 83-697T

Socialist Workers Party; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES, *Plaintiffs-Appellants,*

v.

Secretary of State of the State of Washington, RALPH MUNRO, *Defendant-Appellee.*

APPEAL from the United States District Court for the District of _____

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Tacoma) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is reversed.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. C83-697T

FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

SOCIALIST WORKERS' PARTY, ET AL., *Plaintiffs,*

v.

SECRETARY OF STATE OF THE STATE OF WASHINGTON, *Defendant.*

THIS MATTER came on regularly for hearing before the Court on January 12, 1984, on cross-motions for summary judgment pursuant to Civil Rule 56 by Plaintiffs and Defendant. The parties both agreed that there were no disputed issues of material fact to be resolved, and each side asserted that they were entitled to the relief they requested as a matter of law.

Having considered the pleadings, memoranda of law, the affidavits of fact, the exhibits thereon, and the arguments of counsel, and being fully advised, the Court finds that summary judgment is appropriate under Rule 56, and enters the following:

FINDINGS OF FACT

1. This Court has jurisdiction over the parties and the subject matter herein.

2. Plaintiff Socialist Workers Party is a minor political party in the State of Washington, and has active branches in other states. (Plaintiffs' Affidavit of Ivan King, pp. 1, 2)

3. Plaintiff Dean Peoples was the Socialist Workers Party candidate for U.S. Senate in the 1983 election. (Plaintiffs' Affidavit of Dean Peoples, p. 1)

4. Plaintiffs Leroy Watson and Louise Pittell are apparently registered voters of the State of Washington.

5. Defendant Ralph Munro is the Secretary of State of the State of Washington. As the chief election officer of the State, Mr. Munro has supervisory control over elections pursuant to the provisions of Wash. Rev. Code 29.04.070.

6. A vacancy in the U.S. Senate was created by the death of Henry M. Jackson on September 1, 1983.

7. Due to the timing of that vacancy, the legislature was called into special session on September 10, 1983 and enacted a measure calling for a special primary election on October 11, 1983. (Plaintiffs' Affidavit of Lisa Hickler, p. 3)

8. Plaintiff Dean Peoples was chosen as the candidate of the Socialist Workers Party at a street corner convention conducted on September 16, 1983. (P-1 article Sept. 17, 1983, appended to Plaintiffs' Affidavit of Lisa Hickler)

9. The office of the Secretary of State verified the necessary number of signatures on the certificate of nomination submitted by the Socialist Workers Party, and certified the name of Dean Peoples to appear on the primary election ballot. (Defendant's Affidavit of Donald F. Whiting, p. 2)

10. Dean Peoples received 596 votes in the special primary election conducted on October 11, 1983. (Defendant's Affidavit of Donald F. Whiting, p. 5)

11. The number of votes cast in the special October 11th primary was 681,690. (Defendant's Affidavit of Donald F. Whiting, p. 5)

12. Plaintiff Dean Peoples did not receive enough votes in the primary election to qualify for placement on the general election ballot. (Defendant's Affidavit of Donald F. Whiting, p. 5; Wash. Rev. Code 29.18.110)

13. Plaintiffs instituted this action and sought a show cause hearing on why a preliminary injunction requiring defendant to print the name of Dean Peoples on the general election ballot should not be granted.

14. The show cause hearing was conducted October 26, 1983 and the preliminary injunction request was denied.

15. Wash. Rev. Code 29.18.110, requires candidates for partisan office to obtain one percent of the vote at the

primary election in order to have the candidate's name printed on the general election ballot.

16. Wash. Rev. Code 29.12.110 is part of a minor party election process last amended in 1977.

17. In 1983 the U.S. Senate vacancy was the only partisan state-wide office on the ballot. Only one minor party, the Socialist Workers Party, attempted to place a candidate on the ballot.

CONCLUSIONS OF LAW

1. Insofar as a Finding of Fact may constitute a Conclusion of Law, it is hereby adopted as such.

2. This Court has jurisdiction over the parties and over the subject matter herein, pursuant to Title 28 U.S.C. secs. 1331, 1343, and 1357.

3. The issue presented to this Court is whether rights granted by either the First or Fourteenth Amendment to the U.S. Constitution are violated by the requirement of Wash. Rev. Code 29.18.110.

4. Plaintiffs do not challenge the constitutionality of Wash. Rev. Code 29.18.110 on its face, but only challenge that statute as it applies to minor political parties, specifically the Socialist Workers Party.

5. The standard used to review the challenged statute in ballot access cases hinges upon whether the interests involved are "fundamental." Not every restriction imposed by the states on ballot access is subject to strict scrutiny. *Anderson v. Celebrezze*, 458 U.S. ____, 103 S. Ct. at 1564, 1569, 75 L. Ed. 2d 547 (1983).

6. If the interests are deemed to be fundamental, the state must show the classification is necessary to serve a compelling interest, If, however, the interests are not fundamental, minimum scrutiny is used to determine whether the statute has a rational relationship to a legitimate State interest. *See Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S. Ct. 983, 990 59 L. Ed. 2d 230 (1979).

7. The direct impact of Washington's 1% requirement falls upon aspirants for office. Plaintiffs' purpose in filing

this suit was to seek to have the name of the Socialist Workers Party candidate printed on the general election ballot.

8. The right of candidacy has not been recognized by the United States Supreme Court as a fundamental right. *Bullock v. Carter*, 405 U.S. 134, 142-143, 92 S. Ct. 849, 855 31 L. Ed. 2d 92 (1972).

9. Since the right of candidacy is not fundamental, strict scrutiny is not appropriate in this case. The defendant Secretary of State need only show that Wash. Rev. Code 29.18.110 is rationally related to a legitimate state interest.

10. The United States Supreme Court has identified various legitimate interests that a state has in regulating ballot access and has determined that a state has a legitimate interest in requiring a candidate to demonstrate a "significant modicum of support" within the voting community. *Jenness v. Fortson*, 403 U.S. 431, 442 91 S. Ct. 1970, 1976, 29 L. Ed. 2d 554 (1971).

11. The State of Washington, therefore, has a legitimate interest in regulating ballot access to those candidates who have shown they have a "significant modicum" of public support.

12. Wash. Rev. Code 29.18.110 is a rational means of achieving the legitimate State interest of forcing candidates to demonstrate some measure of public support.

ALTERNATIVE STANDARD OF REVIEW

13. Although the right of candidacy has not been declared to be a "fundamental" interest, the Supreme Court has indicated that the "right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters." *Lubin v. Panish*, 415 U.S. 709, 716 (1974), 94 S. Ct. 1315, 1320, 39 L. Ed. 2d 702 (1974).

14. Assuming the right to candidacy is a fundamental right, defendant Secretary of State has shown that Wash. Rev. Code 29.18.110 is necessary to serve a compelling State interest.

15. The Supreme Court, under the strict scrutiny test, has required a challenged statute to be the least drastic means to achieve the desired ends. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. at 185, 99 S. Ct. at 991.

16. The enacted version of the 1977 amendments was less restrictive than the pre-amendment minor party nominating procedure. The amended version removed all restrictions on the right to vote. Primary voters are now free to vote for any candidate for an office, regardless of whether they attended a minor party nominating convention. Under the pre-amendment version, primary voters who attended a minor party convention were prohibited from voting for any partisan positions on the ballot.

17. Moreover, Wash. Rev. Code 29.18.110 does not operate to completely bar a minor party candidate from the general election ballot if the candidate did not receive one percent of the vote in the primary. That candidate still has access to the general election ballot via the write-in provisions of Wash. Rev. Code 19.51.170.

18. Wash. Rev. Code 29.18.110 is the least drastic means of accomplishing the State's compelling interest.

19. Wash. Rev. Code 29.18.110 does not violate rights guaranteed by either the First or Fourteenth Amendments to the United States Constitution.

Accordingly, it is hereby

ORDERED that Defendant's Motion for Summary Judgment is GRANTED, and Plaintiff's Motion for Summary Judgment is DENIED.

DATED this 28th day of March, 1984.

/s/ JACK E. TANNER
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. C83-697T

JUDGMENT

SOCIALIST WORKERS PARTY, ET AL., *Plaintiffs,*

v.

SECRETARY OF STATE OF THE STATE OF WASHINGTON, *Defendant.*

This action came on for hearing before the court, United States District Judge Jack E. Tanner presiding. The issues having been duly heard and a decision having been duly rendered, it is order and adjudged _____

Defendant's motion for Summary Judgment is GRANTED, and Plaintiff's motion for Summary Judgment is DENIED.

DATED this 28th day of March, 1984.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-3806

NOTICE OF APPEAL

SOCIALIST WORKERS PARTY, ET AL.,
Plaintiffs-Appellants,

v.

Secretary of State of the State of Washington,
RALPH MUNRO, *Defendant-Appellee.*

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Ralph Munro, Secretary of State of the State of Washington, hereby appeals to the Supreme Court of the United States from the July 17, 1985 Opinion and Judgment of the Court of Appeals for the Ninth Circuit, that opinion reversing the decision of the United States District Court for the Western District of Washington.

This appeal is taken pursuant to 28 U.S.C. 1254(2).

DATED this 8th day of October, 1985.

/s/ KENNETH O. EIKENBERRY
Attorney General

/s/ JAMES M. JOHNSON
Senior Assistant
Attorney General

Counsel for Defendant/Appellee
Temple of Justice AV-21
Olympia, WA 98504
(206) 753-4556

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-3806

CERTIFICATE OF SERVICE

SOCIALIST WORKERS PARTY, ET AL.,
Plaintiffs-Appellants,

v.

Secretary of State of the State of Washington,
RALPH MUNRO, *Defendant-Appellee.*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing NOTICE OF APPEAL to the Supreme Court of the United States has been served upon counsel by placing the same in the United States mail, postage prepaid, properly addressed this 8th day of October, 1985, to:

Daniel Hoyt Smith
Smith & Midgley
Attorneys for Plaintiffs/Appellants
2200 Smith Tower
Seattle, Washington 98104

/s/ SHARON A. MORROW
Bruce Rifkin, Clerk
U.S. District Court,
Western District of
Washington
P.O. Box 1935
Tacoma, WA 98401

SUBSCRIBED TO AND SWORN TO before me this 8th day of October, 1985.

/s/ J. M. JOHNSON
Notary Public in and
for the State of
Washington, residing
at Olympia.

(2)

No. 85-656

IN THE

SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1985

Secretary of State of the State of Washington,
Ralph Munro,

Appellant,

v.

Socialist Workers Party, ET AL.

Appellees.

ON APPEAL FROM THE UNITED STATES

COURT OF APPEALS FOR THE

NINTH CIRCUIT

APPELLEE'S MOTION TO AFFIRM OR DISMISS

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Counsel for Appellees

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In the

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Secretary of State of the State of Washington, Ralph Munro,

Appellant,

v.

Socialist Workers Party, et al.,

Appellees.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPELLEES' MOTION TO AFFIRM OR DISMISS

Appellees move to affirm the judgment of the Court of Appeals on the ground that the question presented is so insubstantial as not to need further argument. Appellees are not aware of any jurisdictional

defects, but the Court should independently examine the record and, if any appears, dismiss the appeal.

QUESTION PRESENTED

Where a new and uniquely restrictive ballot access procedure in practice effectively bars almost all minor party candidates from the statewide general election ballot, has the Court of Appeals correctly held that the State must justify the additional restrictions as necessary to limit the ballot to a reasonable number of serious candidates, or to serve some other substantial state interest?

MOTION TO AFFIRM OR DISMISS

The decision of the Court of Appeals is clearly correct. It was unanimous and unequivocal. No petition for rehearing was filed suggesting that any points of law or fact were overlooked or misapprehended by the Court of Appeals.

No suggestion for a hearing or rehearing en banc was made, either on the basis of maintaining uniformity of the Court's decisions, or on a claim that the case involves a question of exceptional importance.

These omissions by the State were appropriate because this case does not in fact involve a question of exceptional importance--to anyone but the voters of the State of Washington. For no other state has an election law anything like the one at issue here. The federal constitutional interests of the voters and candidates at stake were upheld by the Court of Appeals, following the clear guidance provided by this Court from Williams v. Rhodes, 393 U.S. 23 (1968) to Anderson v. Celebrezze, 460 U.S. 780 (1983). The facts are unique in this case, indeed anomalous. But the legal

principles are well established and not in conflict. There are no novel or substantial questions of federal constitutional law presented. And therefore there is no reason for this Court to give this case further consideration.

STATEMENT OF THE CASE

The Court of Appeals properly handled the task of evaluating the new and uniquely[1] restrictive minor party ballot qualification procedures that had brought about "the virtually complete exclusion of serious-minded[2] minor

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[1]Only one other state has apparently ever had a similar restriction on ballot access, and in that state it was also struck down as unconstitutional as applied. SWP v. Secretary of State, 412 Mich. 571, 317 N.W.2d 1 (1982).

[2]Appellant does not challenge the seriousness of Appellee Dean Peoples' candidacy for the U.S. Senate in the Fall of 1983. He was the legally nominated

parties...."[3] since its 1977 enactment.

The record demonstrated that Washington's pre-existing (and continuing) nominating signature requirement was and is sufficient to successfully protect the integrity of the election process against the danger of voter confusion which might

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[2]cont. candidate of the Socialist Workers Party, which has been a nationally active, serious political party for over forty years. Its candidates have regularly participated in local and national election campaigns in the majority of the states in the union, including Washington. The party's program represents a serious alternative to the platforms of the Democratic and Republican parties, with a point of view not represented by the major parties on issues of economics, foreign policy, and social justice. The Appellees assert that election campaigns represent a major forum to present their views to the American people. Such minor party participation in elections is an essential feature of American democracy. Anderson v. Celebrezze, 460 U.S. 780, at n.17.

[3]Quotation from the findings of the Court of Appeals, reproduced in the Jurisdictional Statement (hereafter "JS") at A-7.

result from the presence on the ballot of too numerous or frivolous candidates. In the 20 prior gubernatorial elections in this century, an average of only 4.75 candidates appeared on each general election ballot, and the trend was actually downward. JS:A-6.[4] And the number of candidates for other offices was substantially less than for governor. Id.

This existing system successfully accomodated the state's interest in running manageable elections, together with "the right of individuals to associate for the advancement of political beliefs" in the electoral arena, "and the right of qualified voters, regardless of their political persuasion, to cast their votes

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[4] Cf. Williams v. Rhodes, 393 U.S. 23, 47 (1968) (Harlan, J., concurring) (Eight candidates not confusing).

effectively." Williams v. Rhodes, 393 U.S. 23, 30 (1968). "An election campaign is a means of disseminating ideas as well as obtaining political office." Illinois State Board of Elections v. SWP, 440 U.S. 173, 186 (1979).

> In short, the primary values protected by the First Amendment---"a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)--are served when election campaigns are not monopolized by the existing parties.

Anderson v. Celebrezze, 460 U.S. at 794 (1983).

The record here clearly reveals that the new, additional restrictions have almost totally deprived voters of minor party alternatives in statewide races. As compared to the forty minor party candidates who qualified for the five statewide ballots from 1968 to 1976, in the four

elections which followed the 1977 amendments, through 1984, only eight candidates even attempted to qualify, and seven of those were eliminated by the new restrictions. JS: A-4.

The Court of Appeals carefully applied the balancing test spelled out by this Court in numerous cases from Williams v. Rhodes, 393 U.S. 23 (1968), to Storer v. Brown, 415 U.S. 724 (1974) to Anderson v. Celebrezze, 460 U.S. 780 (1983). No new or different principle, other than those clearly set out in the controlling precedents, was necessary to decide this case.

The state articulated no significant interest making the further restriction necessary.[5] Appellant presented no

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[5]Other than the demonstrably unfounded fear of ballot overcrowding, see n.3, above.

evidence of any prior problem, at any time in the 70-plus year history of Washington elections, which required any remedy, let alone the "draconian" impact of the one adopted. Therefore, the Court of Appeals correctly found the imposition of the new second hurdle unjustified, leaving the state in the wholly satisfactory status quo ante, with the preexisting nominating signature requirement continuing to reasonably limit, but not wholly choke off, access to the ballot.

If in the future some substantial problem develops, the state remains free to fashion some remedy tailored to the nature and gravity of the problem. But without such evidence, a virtually total monopoly of the statewide ballot by the two major parties cannot be justified.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPELLANT.

Appellant makes a handful of criticisms of the Court of Appeals' decision. Each of them, on examination, is transparently insubstantial, and not well founded in the applicable law or the facts of this case. No conflict is demonstrated with any prior decision of this Court.

First, Appellant complains that the Court of Appeals has evaluated the statute as applied, and has not simply found it unconstitutional on its face. JS: 10. It is ironic that the State should complain about the court's conservative and finely tuned approach in this area of fundamental rights where it is well established that one must work with a scalpel, rather than an axe. Cf. Kusper v. Pontikes, 414 U.S. 51, 59 (1973); Procunier v. Martinez, 416 U.S. 396 (1974).

It was a statewide ballot that Plaintiff-Appellee was excluded from by the new restrictions. The record amply demonstrates that the effect was the same on all statewide races.[6] This disparately harsh restrictive effect cannot be justified by the convenience of the simple uniformity in treating different things in the same way. "Sometimes the grossest discrimination can lie in treating things that are different as though they are exactly alike." Jenness v. Fortson, 403 U.S. 431, 442 (1971).

This Court has made it clear that there can be no "litmus-paper test" for determining whether ballot access laws are

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[6]Appellees did not complain of the effect on local elections. The Complaint specifically alleges: "These amendments have since their adoption effectively barred all minor parties from participating in general elections for state-wide office." ER 1, 1:19-21.

unconstitutional, and that the courts must take a realistic look at the facts. Storer v. Brown, 415 U.S. 724, 730 (1974); Anderson, supra, at 789. The Court's opinions in Storer v. Brown and Mandel v. Bradley, 432 U.S. 173 (1977) had previously made it clear that the historical experience with a ballot access law, as applied,[7] is a key element in

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[7]The appropriate inquiry was set out in Storer v. Brown, supra at 742:

> [I]n the context of [Maryland] politics, could a reasonably diligent independent candidate be expected to satisfy the [ballot access] requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not....

In Storer itself, because the District Court had not applied these standards in adjudicating the constitutional issues

determining its constitutionality. It was just such a factual inquiry the Court of Appeals engaged in here.

Likewise, the only other state which previously added a similar primary vote requirement[8] to the nominating petition requirement saw their statute withstand a facial challenge upon its enactment in Hudler v. Austin, 419 F.Supp. 1002 (ED Mich. 1976). But when several years of experience demonstrated that this second hurdle was so restrictive that it barred all but a few minor party candidates from the general election bal-

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[7] cont. before it, we remanded the case "to permit further findings with respect to the extent of the burden imposed on independent candidates."

Mandel, 432 U.S. at 177-178.

[8]Michigan actually required less than 1/3 the primary vote percentage this case involves--0.3% versus 1%.

lot, going far beyond the justification of reasonable limits on ballot size, the statute was struck down as applied. SWP v. Secretary of State, 412 Mich 571, 317 NW2d 1 (1982). It is not surprising, then, that Appellant cites no authority in support of this aspect of the appeal.

Second, the Appellants argue that instead of a fact-specific balancing test, the court should formulate just the sort of universal "litmus test," based on numbers or percentages, which this Court has explicitly rejected.[9] JS: 12-13. Further, the Appellant's argument here is based on an "apples-oranges" comparison. The assertion is that if a 5% signature requirement (gathered over a 6 month

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[9] Storer, supra, at 730; Anderson at 460 U.S. 789.

period) was approved in Jenness,[10] and a 1% signature requirement (over a 55 day period) was approved in American Party of Texas),[11] then a 1% primary vote requirement must be valid (though it was added to Washington's already existing signature requirement).

This reliance on Jenness and American Party is inapt for a number of reasons. In American Party, as in Jenness, the Court examined the record and found substantial evidence to support the lower court's factual finding that the challenged scheme in practice "in no way freezes the status quo," (Jenness) but rather, in fact, "affords minor political parties a

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[10] Jenness v. Fortson, 403 U.S. 431 (1971).

[11] American Party of Texas v. White, 415 U.S. 676 (1974).

real...opportunity for ballot qualification" (American Party). For example, the record in American Party revealed that the SWP had in fact gathered the number of signatures required in Texas, so was not in a position to complain.[12] In both cases this Court found that the evidence did not support any inference that minor parties were, in practice, substantially barred from the general election ballot. The record here clearly supports the opposite conclusion arrived at by the court below.

In addition, the attempted sleight-of-hand comparison,[13] between our

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[12] The Court granted the SWP's separate claim for the absentee ballot placement Texas had denied to minor parties.

[13] "Yet the court below called Washington's 1% requirement 'more difficult to meet'. App. A-8. Why the 9,140 primary votes called for under Washington's 1% requirement would be more difficult to obtain than the 122,883 called for under Jenness or the 18,890 called for under American Party is baffling." JS at 13.

signature plus vote percentage, and the simple petition signature percentages upheld in some other cases is not a worthy argument. It passes over without explanation the significant difference between a signature and a vote,[14] between a one-step and a two-step qualifying requirement, as well as the other significant differences discussed by the

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[14] Cf. Anderson v. Mills, 664 F.2d 600, 610 (6th Cir. 1981) (Addition of "desire to vote" pledge to signature supporting ballot placement held unconstitutional); Hall v. Austin, 495 F.Supp. 782, 790 n.12 (E.D. Mich. 1980) (Distinction between inappropriate vote-getting requirement and legitimate test of community support for ballot placement); and see Williams v. Rhodes, 393 U.S. 23 (1968), at note 10 (42 out of 50 states had signature-only requirements of 1% or less).

court below. JS: A-8.

The Appellant goes on to misstate the nature of the adverse impact of the "relatively early deadlines" criticized by the Court of Appeals. JS 13. The effect of the Washington system is to require independents and minor parties tc select and qualify their candidates on the Saturday prior to the last Monday in July. RCW 29.24.020. This is long before the September primaries,[15] and before the major party candidates have even declared for the primary. RCW 29.18.025.

Those candidates already selected and qualified must then, in September, face

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[15] Contrary to the Appellant's claim at JS: 13, the September primary can only eliminate minor party and independent nominees who qualified in July. It is not a second opportunity for any new minor party or independent candidates to qualify for the ballot after the July nomination signature deadline.

elimination at a stage before the "major parties [have] staked out their positions and selected their nominees...." Anderson, 460 U.S. at 792. This elimination takes place by inserting the name of the minor party's single already--nominated candidate, without explanation, into the mechanism by which the major parties select which one of the many contenders will be nominated to represent them in the general election. "The purpose of a primary election is to narrow the field of candidates to one per party in order that the general electicn might be reserved for major struggles, not intraparty feuds." Cross v. Fong Eu, 430 F.Supp. 1036, 1038 n.2 (N.D. Ca. 1977), citing Storer v. Brown, 415 U.S. 724, 735 (1974).

The system of requiring the minor parties and independents to select and

qualify candidates one step ahead of the major parties significantly burdens ballot access. Tucker v. Salera, 424 U.S. 959 (1976), aff'g 399 F.Supp. 1258 (E.D. Pa. 1975). Cf. Mandel v. Bradley, 432 U.S. 173, 177 (1977). Absent a substantial justification, such a burden cannot stand. It was precisely this principle that led to the holding of Anderson v. Celebrezze, that "the 'extent and nature' of the burdens Ohio has placed on the voters freedcm of choice and freedom of association [by the relatively early deadlines alone] unquestionably outweigh the state's minimal interest...." 460 U.S. at 806.

Finally, with regard to the appellants' many claims as to the "advantages" minor parties enjoy under Washington's "blanket primary," the Court of Appeals gave the appropriately simple response:

"These advantages are insubstan-

tial in the face of the undisputed evidence that the revision as a whole substantially forecloses minor parties from the general election ballot. Moreover, the state does not argue the benefits it extols could not be achieved by less restrictive means."

JS: A-5.

CONCLUSION

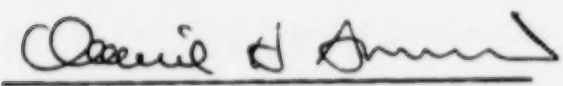
The failure of the state to offer or prove any justification for the effective elimination of minor parties from the statewide ballot left the court below with no choice but to find the challenged new additional restrictions unconstitutional as applied to Plaintiffs--Appellees and others similarly situated. This appeal presents no substantial federal constitutional questions, and this

Court should affirm without further argument.

DATED: December 15, 1985.

Respectfully submitted,

SMITH & MIDGLEY
Attorneys for Appellees



Daniel Hoyt Smith

No. 85-656

IN THE
SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1985

SECRETARY OF STATE OF THE STATE OF WASHINGTON,
RALPH MUNRO,

Appellant.

v.

SOCIALIST WORKERS PARTY, et al.

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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APPEAL DOCKETED OCTOBER 15, 1985
JURISDICTION NOTED JANUARY 13, 1986

152 pp

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	—	LODGED ORDER
Oct 20	4	ORDER To Show Cause 10-26-83 at 9:00 a.m. Copies Mailed
Oct 21	5	NOTICE Of Appearance By James Johnson For Defendant Secretary Of State
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	20	AFFIDAVIT Of Mailing
	21	AFFIDAVIT Of Service, Defendant Motion For Summary Judgment
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C83

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

I. INTRODUCTION

This is an action for Declaratory and Injunctive Relief. Plaintiffs are asking the Court to declare unconstitutional certain provisions of the election laws of the State of Washington adopted in 1977, codified at RCW 29.18.110. These amendments have since their adoption effectively barred all minor parties from participating in general elections for state-wide office. Specifically, the law as applied to the current senatorial election unjustifiably narrows participation from the three parties who have legally nominated candidates to the two major parties, excluding Plaintiff Dean Peoples from the general election ballot. The prior law operated successfully for 70 years to permit the participation of minor parties in general elections, from its enactment in 1907 until its amendment in 1977. The new restrictions are unnecessary, unreasonable, and unconstitutional, and must be struck down.

II. JURISDICTION

This court has jurisdiction under the First and Fourteenth Amendments to the United States Constitution, 28 U.S.C. 1331, 1343, 1357, 2201, 2202 and 42 U.S.C. 1981 and 1983.

III. PLAINTIFFS

3.1 Plaintiff Socialist Workers Party has regularly attempted, since its formation in 1938, to gain general election ballot placement for its candidates. It was frequently successful in this endeavor in the State of Washington until the amendment of RCW 29.18.110 in 1977, and has been unsuccessful since then, in state-wide races, and will probably continue to be unsuccessful in the future, as have all minor parties, until this law is struck down. The Socialist Workers Party campaigns on such issues as full civil rights for Blacks and other oppressed minorities; for equal rights for women; against U.S. military adventures in Central America and elsewhere; for unilaterial U.S. disarmament; and for the formation of an independent labor party based on the power of the industrial unions to represent the interests of working people.

3.2 Plaintiffs Leroy Watson and Louise Pittell are Washington voters. Louise Pittell is not a member of the Socialist Workers Party, but wants the name of the Socialist Workers Party candidate to be placed on the general election ballot so that the issues raised by the Party will be addressed by the various candidates, in the news media and public forums and among the electorate generally, and so that voters will not be limited to a choice between a Democrat and a Republican, but may effectively vote for the Socialist Workers Party candidate should they so decide at the general election.

3.3 Plaintiff Candidate Dean Peoples is a member of the Socialist Workers Party and the party's candidate for United States Senate in the 1983 election, who was

nominated for the office under the provisions of state law, RCW 29.24, but who will be excluded from the general election ballot pursuant to the provisions of RCW 29.18.

IV. DEFENDANTS

Defendant Secretary of State, Ralph Munro, is the chief election officer of the state and has supervisory control over election officials in the performance of their duties, pursuant to RCW 29.

V. FACTS

5.1 Socialist Workers Party candidates have appeared on the Washington State ballot in every presidential election but one since 1948, winning ballot placement in these elections by holding conventions and filing with the Secretary of State petitions bearing the signatures of registered voters of the State as provided by RCW 29.24.

5.2 Other minor parties have also availed themselves of this method of qualification for the general election ballot, giving the voters of the State of Washington a variety of choices in the general election. This system functioned successfully and never resulted in a ballot clogged by "too many" parties, and has never caused voter confusion or otherwise impaired the integrity of the electoral process.

5.3 The laws of the First Extraordinary Session, 1977, Chapter 329, Section 11, effective June 30, 1977, added a new requirement for political parties to obtain a place on the general election ballot to the previous procedure. The Act retained the convention and signature requirements, but provided that the fulfillment of the previous requirements for general election ballot placement now entitled minor party candidates only to a place on the primary ballot. In order to be placed on the general election ballot in November, each candidate is now required to win votes in the primary election in which the

numerous competitors for the Democratic and Republican nomination are competing against each other, equalling at least one percent of the total number of votes cast for all candidates seeking nomination for the position sought. Voters in the primary thus may vote either for one of the candidates seeking the Democratic or Republican nomination for the office, or, in the alternative, cast their vote for ballot placement on the general election ballot of one of the minor parties, which has already nominated its single candidate for the office. In the October special Senatorial primary this resulted in the Socialist Workers Party candidate Plaintiff Peoples competing for votes against 32 Democrats and Republicans, though there was no question who would be the Socialist Workers Party nominee for the general election.

5.4 In the elections following the enactment of these amendments to RCW 29.18, the Socialist Workers Party has made diligent efforts to get votes on primary day to win the prescribed percentage of the primary vote in order to obtain general election ballot placement.

5.5 On information and belief, other minor parties seeking general election ballot placement have also attempted to win the prescribed percentage of the primary vote.

5.6 In no case since the change in the law has any minor party ever succeeded in achieving general election ballot placement for a single candidate in any state-wide race since the change in the law.

5.7 In many of these races, from one to several minor parties fulfilled all of the previous requirements for placement on the general election ballot, and thus were placed instead on the primary ballot. But in each case the effect of the changed law barred them from placement on the general election ballot. In no case would inclusion of all of the qualified minor party candidates on the general election ballot have had any adverse effects on the integrity of the electoral process.

VI. DENIAL OF BALLOT ACCRESS AND EFFECTIVE VOTE

6.1 Because the primary vote requirement of RCW 29.18.110 creates an insurmountable barrier to minor party placement on the general election ballot, Plaintiff Socialist Workers Party will be denied access to public forums, debates, news media coverage, and other avenues of reaching the electorate with its ideas, and its right to associate for the advancement of these ideas and to increase its electoral support will be seriously impaired.

6.2 Because the primary vote requirement of RCW 29.18.110 will bar the Socialist Workers Party from general ballot placement, Plaintiffs Leroy Watson and Louise Pittell will be deprived of their right to exercise effectively the franchise, to associate for the advancement of their political beliefs, and to have the issues raised by the Socialist Workers Party or any other minor party, addressed by the various candidates, in the news media, in public forums, and among the electorate in general. The issues raised in the campaign and the choices available from the general election ballot will be limited to the differences between the Democratic and the Republican party.

VII. CONSTITUTIONAL VIOLATIONS

7.1 Defendants' failure to accept the Socialist Workers Party's demonstration of community support entitling it to general election ballot placement by the traditional convention and petition process, or in any other way than by running in the primary for a percentage of the primary vote, is unnecessary and unreasonable, and denies and unlawfully interferes with Plaintiffs' rights to exercise the franchise effectively and to associate for the advancement of ideas, in violation of the First and Fourteenth Amendments to the United States Constitution and Article 1, Sections 1, 3, 4, 5, 12, 19, and 32 of the Constitution of the State of Washington.

VIII. PRELIMINARY RELIEF REQUIRED

Plaintiffs have no adequate remedy other than this law suit and will be irreparably injured unless preliminary relief is granted by this Court ordering placement of the Socialist Workers Party candidate on the general election ballot for the Senatorial election November 8.

IX. REMEDIES REQUESTED

WEREFORE, Plaintiffs request that the Court:

9.1 Declare the provisions of RCW 29.18.110 unconstitutional insofar as they deprive the Socialist Workers Party of any alternative opportunity to achieve ballot placement other than by winning a percentage of the primary vote;

9.2 Enter a final judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring RCW 29.18.110 invalid and unconstitutional as applied to keep legitimate minor parties off the general election ballot;

9.3 Preliminarily and permanently enjoin the Defendant from enforcing the provisions of RCW 29.18.110 requiring candidates to win a percentage of the primary vote in order to gain placement on the general election ballot;

9.4 Issue a preliminary injunction directing the Defendant to place the name of the lawfully nominated Socialist Workers Party candidate for U.S. Senate on the November 8th general election ballot;

9.5 Award Plaintiffs attorney's fees, costs, and such other relief as the Court may deem just.

DATED this _____ day of October, 1983.

DANIEL HOYT SMITH, P.S.
Attorney for Plaintiffs

/s/ _____
Daniel Hoyt Smith

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
January 6, 1983

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

Plaintiffs, through their attorney of record, hereby move for a Summary Judgment in their favor upon all claims raised in their Complaint.

This motion is based upon the files and records herein, including the Complaint, Plaintiffs' Memorandum in Support of Preliminary Injunction, Plaintiffs' Reply to Defendant's Opposition to Preliminary Injunction, Affidavit of Ivan King, Affidavit of Dean Peoples, Affidavit of Don Whiting, Defendant's Memorandum in Opposition to Motion for Preliminary Injunction, the Plaintiffs' Memorandum in Support of Summary Judgment which is being filed together with this motion, and the Affidavit of Lisa Hickler which is also being filed together with this motion.

The pleadings, affidavits, and other documents on file show that there is no genuine issue as to any material fact

and that the Plaintiffs are entitled to judgment as a matter of law.

DATED December 9, 1983.

DANIEL HOYT SMITH, P.S.
Attorney for Plaintiffs

/s/ _____
Daniel Hoyt Smith

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

PLAINTIFFS' MEMORANDUM IN
SUPPORT OF SUMMARY JUDGMENT

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

I. PERTINENT FACTS

Prior History. There is no evidence to indicate that, in the recorded history of elections in the State of Washington prior to the 1977 imposition of the ballot access restrictions challenged here, there has ever been a problem with a "cluttered ballot," "voter confusion," or the frustration of the democratic process by "frivolous or fraudulent candidacies."

The Socialist Workers Party is not a frivolous or fraudulent party. It has been a nationally organized, serious political party for over forty years. Its candidates have regularly participated in national elections in the majority of states in the union. Its candidates for national and local office have regularly participated in elections in the State of Washington, and have regularly achieved ballot placement prior to the 1977 amendments. The Party's campaigns are conducted by earnest and experienced political activists who are recognized, interviewed and written about by the news media and invited to speak and participate by many organizations. They espouse a serious political program and address important

issues pertaining to race, economics, and government. *See* Affidavit of Lisa Hickler, and attachments thereto.

There is no evidence on the record that the placement of the Socialist Workers Party candidates on the ballot has ever in the past or will in any way in the future impair the ability of the electorate to make rational decisions in the polling booth. On the contrary, the candidates' participation in the general elections may well assure that the electorate is better informed as to crucial issues and alternative positions which the voters may accept, reject, or utilize for comparison.

1983 Election. Of all the minor parties active in politics in the State of Washington, the Socialist Workers Party was the only one able to fulfill the requirements of R.C.W. 29.24.030 for placement on the ballot for the special 1983 senatorial election. It collected over 300 signatures on its nominating convention petitions. This evidences the "modicum" of community support for ballot placement of the candidates which may be constitutionally required.

Plaintiffs ran a serious campaign. They diligently attempted to take advantage of every opportunity to fulfill the requirements of the challenged statute, R.C.W. 29.18.110, to obtain ballot placement in the general election. Their efforts were unsuccessful. So have been the efforts of every other minor party attempting to obtain general election ballot placement in a state-wide campaign since the effective date of the challenged statute. The effect of the challenged statute has been to totally cleanse the ballots of the State of Washington, once so richly populated with contending ideas and philosophies, from any parties besides the Republican Party and the Democratic Party. The face that the vicissitudes of Democratic or Republican Party politics have led John Miller, King Lysen, and Jesse Chiang, established political figures not connected with any political programs or philosophies distinguishable from those of the Democratic or Republican parties, to run as "independents,"

when it seemed unlikely they would be able to win their major party nominations, in no way dilutes the detrimental effect of the challenged statute on minor parties' ability to participate in electoral politics, or the devastating effect on the electorate's range of choice in Washington State elections.

II. THE FUNDAMENTAL RIGHT TO BALLOT ACCESS REQUIRES STRICT SCRUTINY OF RESTRICTIONS ON THAT RIGHT

Ballot access restrictions burden two fundamental rights protected by the Constitution, (a) the right to political association, and (b) the right to cast votes effectively. *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979) (citing *Williams v. Rhodes,* 393 U.S. 23, 30, 89 S.Ct. 5, 21 L.Ed.2d 24 [1968]). The Supreme Court thus holds that when such "vital individual rights are at stake," the state must establish a "compelling interest" and must "adopt the least drastic means to achieve [its] ends." *Id.,* 440 U.S. at 184-185; *accord McLain v. Meier,* 637 F.2d 1159, 1163 (8th Cir. 1980). This is the traditional articulation of the test of strict judicial scrutiny that is applied when state laws burdening fundamental rights are analyzed. In other words, the state laws cannot stand unless they "further compelling state interests . . . that cannot be served equally well in significantly less burdensome ways." *American Party of Texas v. White,* 415 U.S. 767, 780, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974).

The long history of successfully conducted elections in the State of Washington under the significantly less restrictive ballot access provisions contained in R.C.W. 29.24—Nominations Other Than By Primary, clearly demonstrates the viability of less restrictive alternative means to accomplish all legitimate state goals. If the new 1977 addition of the primary hurdle in R.C.W. 29.18.110

is struck down, this will leave the R.C.W. 29.24 signature requirements which have been totally adequate through the past century in producing relatively open, but manageable, general election ballots.

III. THE RIGHT TO BALLOT ACCESS DOES NOT DEPEND ON LIKELIHOOD OF ELECTION TO OFFICE

> As we have repeatedly recognized, voters can assert their preferences only through candidates or parties or both. "It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." *Lubin v. Panish,* 415 U.S. 709, 716, 39 L.Ed.2d 702, 94 S.Ct. 1315 (1974). The right to vote is "heavily burdened" if that vote may be cast only for major party candidates at a time when other parties or other candidates are "clamoring for a place on the ballot." *Ibid.; Williams v. Rhodes, supra,* at 31, 21 L.Ed.2d 24, 89 S.Ct. 5. The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like minded citizens.

Anderson v. Celebrezze, 458 U.S. ___, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). "An election campaign is a means of disseminating ideas as well as attaining political office . . . . Overbroad restrictions on ballot access jeopardize this form of political expression." *Illinois Elections Board v. Socialist Workers Party,* 440 U.S. 173, 186, 59 L.Ed.2d 230, 99 S.Ct. (1979).

> The range of political views in our society cannot be compressed into the platforms of only two parties. Even where minor parties do not actually place candidates in office, their presence on the ballot provides disaffected voters with a means of protesting the status quo or of embracing unorthodox ideas. Developments in the Law—Elections, 88 Harvard L. Rev. 1111, 1123 (1975). The ballot box is our established means of effecting change, and excessive re-

strictions on it may redirect the pressure for change into other, less legitimate channels. While the three percent [signature] requirement imposes no direct limitation on the right to present a political philosophy or the right to associate and solicit new members, if the state has effectively eliminated a political party's access to the ballot, it has deprived the party of much of the substance of the values meant to be insured by the rights of free speech and association.

Vogler v. Miller, 651 P.2d 1 (Alaska 1982).

IV. A "WRITE-IN" CAMPAIGN IS NOT AN ADEQUATE SUBSTITUTE FOR BALLOT PLACEMENT

It is true of course that Ohio permits "write-in" votes for independents. We have previously noted that this opportunity is not an adequate substitute for having the candidate's name appear on the printed ballot.

> It is suggested that a write-in procedure under section 18600 et seq., without a filing fee, would be an adequate alternative to California's present filing fee requirement. The realities of the electoral process, however, strongly suggest that "access" via write-in votes falls far short of access in terms of having the name of the candidate on the ballot . . . . [A candidate] relegated to the write-in provision would be forced to rest his chances solely upon those voters who would remember his name and take the affirmative step of writing it on the ballot.

Lubin v. Panish, supra, 415 U.S. at 719 n.5.

Indeed, in the 1980 presidential election, only 27 votes were cast in the State of Ohio for write-in candidates.

Anderson v. Celebrezze, supra, at 75 L.Ed. 564, n.26.

V. THE EFFECTS OF BALLOT ACCESS RESTRICTIONS ON MINOR PARTIES MUST BE EVALUATED SEPARATELY FROM THE EFFECTS ON "INDEPENDENT" CANDIDATES

Moreover, recognizing the different functions that

minor parties and independent candidates play in the political process, the Court has insisted that one is not a substitute for the other and that the difficulty of qualifying through one route cannot be justified by the openness of the other.

To the extent that minor parties are continuing organizations adhering to a basic ideology rather than vehicles for their principle candidates (*see generally* M. Duverger, *Political Parties* 290-291 (1965); V. O. Key, *supra,* n.6, at 280-281), they are likely to exist outside the mainstream of electoral politics, perhaps moreso than is typically true of independent candidates. From the standpoint of potential supporters, minor parties and independent candidates differ in that the latter are free from ties and obligations to party organizations, and support for them is not so total a commitment of political allegiance because it does not require renunciation of major party affiliation, *see Storer v. Brown,* 415 U.S. 724, 745-746 (1974); *but see* I.R. Gen. Laws Ann. § 17-15-24 (1969) (barring signers of independent candidate nominating petitions from voting in party primaries for 26 months), held unconstitutional, *Yale v. Curvin,* 345 F.Supp. 447 (D.R.I. 1972).

> *See Storer v. Brown,* 415 U.S. at 745-746. *American Party* implicitly adopted this view by evaluating the constitutionality of restrictions on independent candidates and those on minor parties separately.

Developments—Election, Law, 88 Harv.L.Rev. 1111, 1143 (1975).

VI. WASHINGTON LAWS ARE UNIQUELY RESTRICTIVE

A. Requiring Primary Votes is Qualitatively More Restrictive Than Requiring Nominating Signatures.

In upholding Georgia's nominating signature requirement, the United States Supreme Court in *Jenness v. Fortson,* 403 U.S. 431, 29 L.Ed.2d 554, 91 S.Ct. 1970 (1971), pointed out that "Georgia's election laws, unlike Ohio's, do not operate to freeze the political status quo."

The reasons included the following:

> Georgia imposes no suffocating restrictions whatever upon the free circulation of nominating petitions. A voter may sign a petition even though he has signed others, and a voter who has signed the petition of a non-party candidate is free thereafter to participate in a party primary. The signer of a petition is not required to state that he intends to vote for that candidate at the election. A person who has previously voted in a party primary is fully eligible to sign a petition, and so, on the other hand, is a person who was not even registered at the time of the previous election. No signature on a nominating petition need be notarized.

The Court then went on to rely on the history of success of third party and independent candidates under Georgia election law as its basis for affirming the constitutionality of the law as applied in practice.

Footnote 10 in *Williams v. Rhodes,* 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) surveyed each state of the union's requirements for ballot access for third party candidates. Apparently no state had a requirement of *votes,* as opposed to *signatures.* The states surveyed had signature requirements as follows:

Signatures required as a percentage of electorate	*Number of states*
De minimis to 0.1%	16
0.1% to 1%	26
1.1% to 3%	3
3.1% to 5%	4

Thus, 42 out of the 50 states had *signature* requirements of 1% or less of those voting. State ballot access restrictions were more recently surveyed in "Developments—Election Law," 88 Harv.L.Rev. 1111 (1975), where the authors, in 1975, again foud no state requiring independents or minor parties to get a percentage of the *vote* in the primary to gain ballot access for the general election.

B. No Other State Requires Votes In Addition To Signatures For Ballot Placement.

As has been pointed out, the single other state which subsequently adopted a provision similar to Washington's, the State of Michigan, saw it struck down in *SWP v. Secretary of State,* 412 Mich. 571, 717 N.W.2d 1 (1982). Other courts have struck down similar added provisos attached to petition requirements. For example, the Sixth Circuit Court of Appeals affirmed a district court's order striking down the Kentucky election law requiring petition signers to declare that they "desire to vote" for the candidate in question, noting "the Supreme Court has never approved a declaration similar to the Kentucky 'desire to vote provision.' In fact, part of the reason why the Supreme Court approved the Georgia election law in *Jenness* was because that law *did not* require petition signers to state that they intended to vote for the candidate in the general election." *Anderson v. Mills,* 664 F.2d 600, 610 (6th Cir. 1981). Another federal district court struck down the North Carolina requirement that petition signers affiliate with the party whose candidate they were asking be placed on the ballot. *N.C. SWP v. N.C. State Board,* 538 F.Supp. 864 (E.D.N.C. 1982). Another court pointed out, in ordering Gus Hall and Angela Davis placed on the Michigan ballot as the Presidential candidates of the Communist Party:

> Defendants assert that although Hall conducted presidential campaigns in the past, he never received more than a few thousand votes in any given state. But electability is not an appropriate prerequisite for ballot access. The real question is whether there is enough support for placing a given candidate on the ballot, not whether there is enough support for electing the candidate. A large segment of the public may be determined never to vote for Hall and Davis yet may wish to see them on the ballot and support their effort to get put on the ballot. Another segment of the population may be attracted to Hall and Davis, may find their viewpoint appealing, and may even support their candidacy in various ways. Yet when the members of this sympathetic constituency finally enter the voting booth, they may decide to vote

> for candidates with a greater likelihood of success. Considering Hall and Davis's support in this sense—putting aside the question of their vote-getting ability—the court is bound to conclude that they have substantial community support.

Hall v. Austin, 495 F.Supp. 782, 790 n.12 (E.D.Mich. 1980). The court there pinpointed the precise defects in the Washington primary *vote* requirement, which confuses community support for ballot placement, with the much different criterion of electoral success, and may explain why the uniquely burdensome Washington system has not been adopted elsewhere, except in Michigan where it was struck down.

The Washington system also inappropriately relegates minor parties' already selected candidates to a primary election in which internal party politics of the major parties are what is at stake. "The purpose of a primary election is to narrow the field of candidates to one per party in order that the general election might be reserved for major struggles, not intraparty feuds." *Cross v. Fong Eu,* 430 F.Supp. 1036, 1038 n.2 (N.D.Ca. 1977), citing *Storer v. Brown,* 415 U.S. 724, 735, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974).

VII. THE WASHINGTON STATUTE, AS APPLIED, HAS TOTALLY EXCLUDED THIRD PARTIES FROM THE BALLOT

"The Constitution requires that access to the electorate be real, not merely theoretical." *American Party of Texas v. White,* 415 U.S. 767, 783, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974). Thus,

> [T]he state must provide a *feasible* opportunity for new political organizations and their candidates to appear on the ballot.

Storer v. Brown, 415 U.S. 724, 746, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). The test is:

> Could a reasonable diligent independent candidate be expected to satisfy the significant requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?

Id. at 742. The Court of Appeals in *McLain v. Meier,* 637 F.2d 1159 (8th Cir. 1980) struck down the North Dakota election laws as unreasonably restrictive where it had the effect of excluding third party groups from the ballot. The court explained:

> In *Storer v. Brown, supra,* the Supreme Court suggested that the experience of a "reasonably diligent . . . candidate" is a helpful if not unerring guide to the constitutionality of access requirements. "It is one thing if independent candidates have qualified with some regularity and quite a different matter if they have not *with some regularity.*" 415 U.S. at 742, [Emphasis added.]
>
> Here, the record shows that third parties have not qualified for ballot position in North Dakota with regularity, or even occasionally . . . .
>
> In sum, it seems clear to us that North Dakota's access requirements go beyond what is required by the state's valid interest in the effective functioning of the electoral process. The state may understandably and properly prevent the clogging of its election machinery with frivolous, fraudulent or confusing candidates. However, as the Supreme Court has noted, no more than a handful of parties attempts to qualify for ballot positions even when a very low number of signatures, such as 1% of the electorate, is required. *Williams v. Rhodes, supra.* The remote danger of multitudinous fragmentary groups cannot justify an immediate and crippling effect on the basic constitutional right to vote for a third party candidate. Accordingly, we reverse the judgment of the district court upholding as constitutional North Dakota's ballot access requirements.

637 F.2d at 1165.

The Washington experience is similarly instructive. Appendix A demonstrates the long and successful history of minimally restrictive ballot access laws in Washington.

This came to a total halt in 1977. Normally, three to six parties have participated in state-wide races. There is no evidence that this clogged the election machinery or confused the voters. The one year prior to 1977 in which only two parties were on the ballot was 1952. This was not a political atmosphere of which we should feel proud. It may be one that our state legislators would like to recreate, but such nostalgia does not qualify as a compelling state interest to justify their doing so. "Even though the drafting of election laws is no doubt the handiwork of the major parties that are typically dominant in state legislatures, it does not follow that the particular interests of the major parties can automatically be characterized as legitimate state interests." *Anderson v. Celebrezze, supra,* at 75 L.Ed.2d 567, n.30.

The highest number of candidates ever nominated under the prior Washington procedure was 8, which occurred in 1936 and again in 1976, some forty years later. The number question was discussed in *Williams v. Rhodes,* 393 U.S. 23, 21 L.Ed.2d 24, 89 S.Ct. 5 (1968):

> As my Brother Black's opinion suggests, the only legitimate interest the State may invoke in defense of this barrier to third party candidacies is the fear that, without such a barrier, candidacies will proliferate in such numbers as to create a substantial risk of voter confusion. Ohio's requirement cannot be said to be reasonably related to this interest. Even in the unprecedented event of a complete and utter popular disaffection with the two established parties, Ohio law would permit as many as six additional party candidates to compete with the Democrats and Republicans only if popular support should be divided relatively evenly among the groups. And with such fundamental freedoms as stake, such an unlikely hypothesis cannot support an incursion upon protected rights, especially since the presence of eight candidacies cannot be said, in light of experience, to carry a significant danger of voter confusion. As both Ohio's electoral history and the actions taken by the overwhelming majority of other states suggest, opening the ballot to this extent is perfectly consistent

> with the effective functioning of the electoral process. In sum, I think that Ohio has fallen far short of showing the compelling state interest necessary to overcome this otherwise protected right of political association.
>
> Since Ohio's requirement is so clearly disproportionate to the magnitude of the risk that it may properly act to prevent, I need not reach the question of the size of the signature barrier a state may legitimately raise against third parties on this ground. This should be left to the Ohio legislature in the first instance.

393 U.S. at 46 (Harlan, concurring).

VIII. CONCLUSION

The teachings of the Supreme Court on this issue are summed up in the vernacular aphorism: "If it ain't broke, don't fix it." And second, if is broke, the remedy must (a) hit the target and (b) not be overbroad, because

> Even when pursuing a legitimate interest, a state may not choose means that unnecessarily restrict constitutionally protected liberty. *Dunn v. Blumstein,* 405 U.S. at 343. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button,* 371 U.S. 415, 438 (1963). If the state has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.

Kusper v. Pontikes, 414 U.S. 51, 59, 194 S.Ct. 303, 38 L.Ed.2d 260 (1973).

The legislature clearly went too far in 1977 when it added the second step primary vote requirement to the historically tested first step signature requirements for ballot access. A decision by this court simply striking down the additional second step requirement will return the state to the system that worked so well from 1896 to 1977 (*see* Appendix A).

In short, the primary values protected by the First Amendment—"a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Company v. Sullivan*, 376 U.S. 254, 270, 84 S.C. 710, 11 L.Ed.2d 686 (1964)—are served when election campaigns are not monopolized by the existing political parties.

Anderson v. Celebrezze, supra at 75 L.Ed. 561.

DATED December 9, 1983.

Respectfully submitted,
DANIEL HOYT SMITH, P.S.
Attorney for Plaintiffs

/s/ _____
Daniel Hoyt Smith

APPENDIX A

CANDIDATES FOR GOVERNOR
Washington State

Name	Party	Vote	Source
1896			
P. C. Sullivan	Republican	38,154	1
John R. Roger	Peoples Party	50,849	
R. E. Dunlap	Prohibition	2,542	
1900			
J. M. Frink	Republican	49,860	2
John R. Rogers	Democratic	52,049	
R. E. Dunlap	Prohibition	2,103	
William McCormick	Socialist Labor	843	
W. C. Randolph	Social Democratic	1,670	
1904			
Albert Mead	Republican	74,278	3
George Turner	Democratic	59,119	
William McCormick	Socialist Labor	1,070	
D. Burgess	Socialist	7,420	
Ambrosh Henry Sherwood	Prohibition	2,782	
1908			
Samuel G. Cosgrove	Republican	110,190	3
John Pattison	Democratic	58,126	
A. S. Caton	Prohibition	3,514	
George Boomer	Socialist	4,311	
1912			
M. E. Hay	Republican	96,629	4
Ernest Lister	Democratic	97,251	
Anna M. Maley	Socialist	37,155	
Abraham L. Brearcliff	Socialist Labor	1,369	
George F. Stivers	Prohibition	8,163	
Robert T. Hodge	Progressive	77,792	
1916			
Henry McBride	Republican	167,809	5
Ernest Lister	Democratic	181,645	
James E. Bradford	Progressive	2,894	
1920			
Louis F. Hart	Republican	210,662	6
W. W. Black	Democratic	66,079	
David Burgess	Socialist Labor	1,296	
Robert Bridges	Farmer-Labor	121,371	
1924			
Roland H. Hartley	Republican	220,162	7
Ben F. Hill	Democrat	126,447	
J. R. Oman	Farmer-Labor	40,073	
David Burgess	Socialist Labor	770	
Emil Hermann	Socialist	898	
William Gilmore	State Party	1,954	

1928			
Roland H. Hartley	Republican	281,991	8
Scott Bullit	Democrat	214,334	
James F. Skark	Socialist Labor	3,343	
Walter Price	Socialist	1,262	
Aaron Fyslerman	Workers Party	698	
1932			
John A. Gellatly	Republican	207,494	9
Clarence D. Martin	Democrat	353,215	
John F. McKay	Socialist	9,987	
Maslen Meade	Independent	378	
Edward Kriz	Socialist Labor	449	
L. C. Hicks	Liberty	47,710	
Fred E. Walker	Communist	2,532	
1936			
Clarence Martin	Democrat	466,550	10
Roland H. Hartley	Republican	189,141	
John F. McKay	Socialist	4,221	
Eugene Solie	Socialist Labor	466	
O. M. Nelson	Union	6,349	
Harold P. Brockway	Communist	1,939	
William Bouck	Farmer-Labor Commonwealth	1,994	
Malcolm M. Moore	Christian	1,947	
1940			
C. C. Dill	Democrat	386,706	10
Arthur B. Langlie	Republican	392,522	
P. J. Ater	Socialist Labor	426	
John Brockway	Communist	1,674	
1944			
Mon C. Wallgren	Democrat		3
Arthur B. Langlie	Republican		
Henry K. C. Gusey	Socialist Labor		
Allen Emmersen	Progressive		
1948			
Mon C. Wallgren	Democrat	417,035	11
Arthur B. Langlie	Republican	445,958	
Russell H. Fluent	Progressive	19,224	
Henry Killman	Socialist Labor	780	
Daniel Roberts	Socialist Workers	144	
1952			
Arthur B. Langlie	Republican	567,675	12
Hugh B. Mitchell	Democrat	510,657	
1956			
Emmett T. Anderson	Republican	508,122	13
Albert D. Rosellini	Democrat	616,987	
Henry Killman	Socialist Labor	4,163	
1960			
Lloyd Andrews	Republican	594,122	13
Albert D. Rosellini	Democrat	611,987	
Henry Killman	Socialist Labor	8,647	
Jack Wright	Socialist Workers	992	

1964			
Daniel J. Evans	Republican	697,256	14
Albert D. Rosellini	Democrat	548,692	
Henry Killman	Socialist Labor	4,326	
1968			
John J. O'Connell	Democrat	560,262	14
Daniel J. Evans	Republican	692,378	
Ken Chriswell	Conservative	11,602	
Henry Killman	Socialist Labor	1,113	
1972			
Rosellini	Democrat	630,613	14
Evans	Republican	747,825	
Gould	Taxpayer$	86,843	
Killman	Socialist Labor	2,709	
David	Socialist Workers	4,552	
1976			
John D. Spellman	Republican	687,039	15
Dixy Lee Ray	Democrat	821,797	
Henry Killman	Socialist Labor	4,137	
Art Manning	American Independent	12,406	
Evelyn Olafson	U.S. Labor	1,364	
Red Kelly	O.W.L.	12,400	
Patricia Bethard	Socialist Workers	3,106	
Maurice Woodrow Willey Jr.	Libertarian	4,133	
1980			
John Spellman	Republican	981,083	16
McDermott	Democrat	749,813	

Sources

1 Secretary of State Report 1893-6
2 Secretary of State 1899-1902
3 Abstract of Washington Territory and Washington State Votes 1865-1950
4 State of Washington, Abstract of Votes 1910-1914
5 State of Washington, Election Division Report 1913-1918
6 State of Washington, Election Division Biennial Report 1919-1922
7 State of Washington, Election Division Biennial Report 1923-24
8 State of Washington, Abstract of Votes General Election 1928
9 Washington State Abstract of Votes 1932, 1934
10 Washington State Secretary of State Abstract of Votes 1936-42
11 State of Washington Abstract of Votes 1948
12 State of Washington Official Abstract of Votes State General Election 1950-52
13 State of Washington Official Abstract of Votes State General Election 1954-62
14 State of Washington Abstract of Votes General Election 1964-74
15 State of Washington Abstract of Votes Primary and General Election 1976
16 State of Washington, Canvass of the Returns of the State of General Election 1980

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

AFFIDAVIT OF LISA HICKLER

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

STATE OF WASHINGTON
} ss.
COUNTY OF KING

Lisa Hickler, on oath, states as follows:

1. I am the chairperson of the Washington Socialist Workers 1983 Campaign Committee and make this affidavit in support of our Motion for Summary Judgment.

2. The political activity of the Socialist Workers Party, including electoral campaigns, is conducted with the purpose of changing which social class holds political power in the United States.

3. Socialist Workers Party election campaigns place candidates before the electorate who popularize this goal by:

a. elaborating a strategy for workers and their allies to break politically from the Democratic and Republican parties and create a party of the working class;

b. explaining that the policies of the Democrats and Republicans are designed, above all, to maintain the economic system of capitalism;

c. disseminating information about the social gains in countries where capitalism has been or is in the process of being overthrown, such as Cuba or Nicaragua;

d. explaining how the election of SWP candidates would be a step in the direction of establishing a workers and farmers government in the U.S. In this respect, the SWP calls special attention to the example of Mel Mason, an SWP member who was elected as a socialist to the City Council of Seaside, California.

4. The SWP has run in every presidential election since 1948 and in recent presidential elections has won ballot status in states containing the majority of U.S. voters. In the November 1983 elections the SWP nationally fielded 31 candidates in 11 states. Running election campaigns for national, state and local offices has been a permanent part of the SWP's strategy for winning political power in the United States.

5. The seriousness of the SWP's election campaigns is evident from two different points of view: the policies the SWP espouses and the efforts it makes to popularize its ideas and get its candidates elected to public office.

6. From the point of view of the policies the SWP advocates, the specific proposals of the Dean Peoples for U.S. Senate Campaign are detailed in the appended campaign brochure. They will not be repeated here. It should be clear that the program of the SWP involves a complete change in economic system and in government. Since the system the SWP advocates—socialism—is in various stages of implementation in countries comprising about one-third of the population of the earth, the charge of "non-seriousness" or "frivolity" which figures prominently in the public and legislative debate leading to the passage of the current state election law, can be motivated only by political hostility, not facts.

7. Evidence of the seriousness of SWP candidates in the State of Washington is apparent from the record of the Washington Socialist Workers 1983 Campaign Committee (hereinafter: Committee).

8. The Committee's first challenge was to win ballot status for the October 11 primary election for the seat vacated by the death of Senator Henry Jackson. This involved, within the time of one week:

a. selecting a candidate;

b. collecting the filing all necessary papers;

c. placing a legal notice for in advance and holding a nominating convention at which 304 people signed nominating papers for Dean Peoples.

d. producing a 1500-word campaign brochure in advance of the convention to inform nominees of Peoples' and the SWP's policies and program. This required an organizational effort that no other minor party or independent candidate was able to achieve.

9. The Committee organized and publicized three public meetings for Peoples' campaign:

a. a campaign open house—September 25, 1983

b. a campaign forum entitled "Will 'Buy American' Save Jobs?"—October 15, 1983

c. a campaign rally organized around the theme: "U.S. Hands Off Grenada Now!"—November 5, 1983

10. The Committee organized appearances for Peoples at various community meetings and radio and TV shows.

11. The Committee published and disseminated over 10,000 pieces of campaign literature through:

a. 48 visits to Seattle-area industrial plant gates;

b. mobilizing 12-15 campaign volunteers on each Saturday from September 24, 1983 through November 5, 1983.

12. The Committee organized three news conferences and published five news releases.

13. The Committee submitted two articles to the *Militant,* the SWP's national newspaper (circulation: 7,000) covering the activities and issues of Peoples' campaign.

14. The Committee raised and disbursed over $1900 to finance the activities outlined above. The entirety of

this activity took place between September 10, 1983, when the special election law was passed, and November 8, 1983, election day.

/s/ _____
Lisa Hickler

SUBSCRIBED AND SWORN to before me this _____ day of December, 1983.

_____
NOTARY PUBLIC in and for the State of Washington, residing at Seattle

Why not a worker for U.S. Senate?

Vote Socialist Workers Party!

Dean Peoples, SWP candidate for U.S. Senate and striking Todd shipyard worker. Member of IBEW Local 48.

The United States government is at war. U.S. warships are steaming off the coast of Nicaragua. 4,000 U.S. troops are on maneuvers in Honduras. Reagan has set up a bi-partisan war commission to provide cover for the deepening U.S. intervention in Central America and the Caribbean. The targets: the social revolution in El Salvador and the revolutionary governments of Nicaragua, Grenada and Cuba.

U.S. Marines are being killed defending the brutal Gemayel dictatorship in Lebanon.

The U.S. government supports the racist regime in South Africa. The U.S. war on Vietnam and Kampuchea continues with military threats and economic blackmail.

But this is only half the picture. The rulers of this country are also at war against working people at home. Workers in industry after industry face attacks on their standard of living and their union rights. The national guard has been used against striking miners in Arizona to bust their strike and herd scabs into the mines. The Metal Trades workers in Seattle were forced to strike by vicious contract demands aimed at gutting their unions. The shipyard workers are battling a similar boss attack.

Blacks and other minorities face job discrimination, racist violence, and attacks on busing, education, and affirmative action programs. The income gap between Black and white workers is the same as it was 20 years ago – Blacks earn only $.56 to every $1.00 earned by whites.

In Washington state, the chokehold has been used to murder Black prisoners, and the murderer of a Black U.W. student walks the streets – freed by an all-white jury. While Martin Luther King Way remains a dream, it took less than two weeks for Sea-Tac to become Henry Jackson International Airport.

Women still suffer from discrimination in hiring and pay, and attacks on abortion rights. Despite majority sentiment for the Equal Rights Amendment, the Democrats and Republicans have refused to pass the ERA. Women at City Light face discrimination and management-orchestrated harassment.

As social services are slashed, trillions of dollars pour into the sinkhole of the war budget. Unemployment hovers above 9 percent even with the economy in a "recovery."

Demands for "protectionist" legislation in the form of import duties and quotas, and the "buy American" campaign are not the solution to unemployment. These are reactionary campaigns to shift the blame for unemployment onto the backs of foreign workers.

Working farmers face staggering interest rates on loans, declining incomes and soaring costs. Migrant farm workers are exploited by unsafe working conditions and sub-minimum wages.

The employers and the government

PAGES 32-58 ARE OMITTED (newspaper articles and press releases attached to affidavit) FROM THE JOINT APPENDIX.

These were omitted because, as printed, they did not comply with this Court's Rules. (The type was too small).

These materials are found in the record, from the District Court as attachments to Affidvit of Lisa Hickler, CR-13.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND DISMISSAL

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

COMES Now Defendant Ralph Munro, Secretary of State of the State of Washington, by and through his attorney of record, Charles R. Hostnik, Assistant Attorney General, and hereby moves this court for summary judgment in his favor and an order of dismissal. This motion is based upon the attached Memorandum of Authorities in Support of Defendant's Motion for Summary Judgment and the files herein.

DATED this 9th day of December, 1983.

KENNETH O. EIKENBERRY
Attorney General

/s/ _____
Charles R. Hostnik
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

I. NATURE OF THE CASE

This action was filed by plaintiffs on October 18, 1983. The case was instituted for two reasons. First, plaintiffs sought a preliminary injunction directing the Secretary of State to place the name of the Socialist Workers Party candidate on the general election ballot. Secondly, plaintiffs sought to have RCW 29.18.110 declared unconstitutional.

The preliminary injunction issue was heard October 26, 1983. At that time this court orally denied the preliminary injunction.

On December 9, 1983 plaintiffs and defendant each filed a motion for summary judgment. Thus the merits of the case are now before this court.

II. ISSUE PRESENTED

The provisions of RCW 29.18.110 require minor party candidates to achieve one percent of the primary vote in order to have their name printed on the general

election ballot. The issue presented to this court is whether that requirement violates either First or Fourteenth Amendment rights.

III. STANDARD OF REVIEW

Plaintiffs assert violations of two constitutional rights—freedom of association and equal protection. See Complaint at p. 6, section 7.1. These rights are normally asserted in ballot restriction cases.[1]

Bullock v. Carter, 405 U.S. 134, 31 L.Ed.2d 92, 92 S.t. 849 (1972).

If the interests are fundamental, the state must show the classification is necessary to serve a compelling interest. If, however, the interests are not fundamental, minimum scrutiny is used to determine whether the statute has a rational relationship to a legitimate state interest. *Illinois State Board of Elections v. Socialist Workers Party, supra,* 440 U.S. at 184; Rada, Cardwell, and Friedman, "Access to the Ballot," The Urban Lawyer, vol. 13, p. 793 at 803.

The direct interest asserted by plaintiffs is the right of candidacy. Plaintiffs' purpose in filing this suit was to seek to have the name of the Socialist Workers Party candidate printed on the general election ballot. Candidacy has not been recognized by the United States Supreme Court as a fundamental right. *Bullock v. Carter, supra,* 405 U.S. at 142, 143.[2]

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[1]See: *Williams v. Rhodes,* 393 U.S. 23, 21 L.Ed.2d 24, 89 S.Ct. 5, 45 Ohio Ops 2d 236 (1968); *Jenness v. Fortson,* 403 U.S. 431, 29 L.Ed.2d 554, 91 S.Ct. 1970 (1971); *American Party of Texas v. White,* 415 U.S. 767, 39 L.Ed.2d 744, 94 S.Ct. 1296 (1974); *Storer v. Brown,* 415 U.S. 724, 39 L.Ed.2d 714, 94 S.Ct. 1274 (1974); *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 59 L.Ed.2d 230, 99 S.Ct. 983 (1979).

[2]In a later case, the court noted that the "right of a party or an individual to a place on a ballot is entitled to protection . . ." but the court stopped short of declaring the right to be fundamental. *Lubin v. Panish,* 415 U.S. 709, 39 L.Ed.2d 702, 94 S.Ct. 1315 (1974). Also see infra at p. 7.

Therefore the appropriate standard of review is that of minimum scrutiny. The defendants need only show that RCW 29.18.110 is rationally related to a legitimate state interest. If this is demonstrated, the statute must be declared constitutional.

IV. RCW 29.18.110 IS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST

A. Legitimate State Interests

The United States Supreme Court has validated several legitimate state interests in regulating ballot access. These have been variously described as: (1) preventing voter confusion,[3] (2) upholding the integrity of the election process,[4] (3) assuring the winner is the choice of at least a strong plurality of the voters, without the burden and expense of runoff elections,[5] and (4) requiring the candidate to demonstrate a "significant modicum of support" to test the seriousness of the candidate within the voting community.[6]

These related interests were recognized in *Lubin v. Panish, supra:*

> In *Bullock v. Carter* [supra] we recognized that the State's interest in keeping its ballots within manageable, understandable limits is of the highest order . . . A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence tend to impede the electoral process. . . . *The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not.*

---

[3] *Lubin v. Panish, supra,* 415 U.S. at 715.
[4] *Storer v. Brown, supra,* 415 U.S. at 730.
[5] *Bullock v. Carter, supra,* 405 U.S. at 145.
[6] *Jenness v. Fortson, supra,* 403 U.S. at 442.

Lubin v. Panish, supra, 415 U S. at 715 (emphasis added); quoted with approval in *Illinois State Board of Elections v. Socialist Workers Party, supra,* 440 U.S. at 185.

Thus the State of Washington has a legitimate interest in restricting ballot access to candidates who have demonstrated public support.

The question now arises whether RCW 29.18.110 is a rational means of achieving the legitimate state interest.

B. RCW 29.18.110 Does Rationally Relate to the State's Legitimate Interests.

In 1977 the legislature revised the nomination procedures for minor parties. Laws of 1977, 1 ex. sess., ch. 329. The legislature was concerned, following the 1976 state general election, that the general election ballot was becoming cluttered by candidates who were unable to demonstrate any significant public support. A deliberate attempt was made to correct this situation without unnecessarily limiting the participation of minor parties in the election process.

Prior to 1977, minor party conventions were held on the same day as the state primary election. See Laws of 1965, ch. 9, sec. 29.24.020. Those who participated in a convention could not vote in the state primary. See Laws of 1965, ch. 9, sec. 29.24.040, 29.24.050. The minor party nominated its candidates at this convention, and those candidates were then placed on the general election ballot.

This system led to complaints by those voters who attended minor party conventions and therefore were unable to vote in the state primary for candidates not nominated by the minor party. Other administrative problems were inherent in this system.

Rather than increase the qualifying standard to nominate minor party candidates directly to the general election ballot, the legislature chose an approach where it would be relatively easy to qualify for the primary ballot,

but where a minimum showing of support would be required to be placed on the general election ballot. This approach gave those minor party or independent candidates who did appear on the general election ballot greater legitimacy in the eyes of the public and media. It also distinguished them from other minor parties or independent candidates who had not yet achieved that level of public acceptance.

The provisions of ch. 29.24 RCW govern nominations of minor party and independent candidates. There have only been eight nominations to statewide office under the provisions of ch. 29.24 RCW since 1977.[7] Three of these eight candidates have qualified for the general election ballot. In one of those cases, a candidate nominated under ch. 29.94 RCW received more votes in the general election than one of the major party candidates (Attorney General race, 1980 election).[8]

The 1977 amendments clearly do not bar minor party access to the general election ballot, and do rationally relate to the state's legitimate interest of restricting ballot access to candidates with demonstrated public support.

V. RCW 29.18.110 SURVIVES STRICT SCRUTINY

A. Applicability of Strict Scrutiny

Although the right of candidacy has not been declared to be a "fundamental" interest, the Supreme Court has indicated that the "right of a party or an individual to a place on the ballot is entitled to protection and is intertwined with the rights of voters." *Lubin v. Panish, supra,* 415 U.S. at 716. Lower federal courts, however, have discussed the right to run for public office in terms of being "fundamental." *Mancuso v. Taft,* 476 F.2d 187 (1st

[7]This excludes the position of president where minor party candidates do appear on the general election ballot automatically because Washington has no presidential primary.

[8]See Affidavit of Donald F. Whiting, filed October 24, 1983.

Cir. 1973); *Duncantell v. City of Houston, Texas,* 333 F.Supp. 973 (S.D. Tex. 1971).[9] Neither of these are Ninth Circuit cases.[9]

Assuming arguendo fundamental rights are at issue here, RCW 29.18.110 must be necessary to serve a compelling state interest to be constitutionally valid. *Illinois State Board of Elections v. Socialist Workers Party, supra,* 440 U.S. at 184. Defendants do not concede, however, that this is the proper standard of review in this case.

B. Compelling State Interest

States have a judicially recognized compelling interest in protection of the integrity of its election process. *American Party of Texas v. White, supra,* 415 U.S. at 767, footnote 14. This includes the important state interest in requiring a preliminary showing of voter support before printing a candidate's name on the ballot. *Jenness v. Fortson, supra,* 403 U.S. at 442.

> . . . we think that the state's admittedly vital interests [of preservation of the integrity of the electoral process and regulating the number of candidates on the ballot to avoid undue voter confusion] are sufficiently implicated to insist that political parties appearing on the general ballot demonstrate a significant, measurable quantrum of community support. So long as the larger parties must demonstrate major support among the electorate at the last election, whereas the smaller parties need not, the latter, without being invidiously treated, may be required to establish their position in some other manner.

American Party of Texas v. White, supra, 415 U.S. at 782, 783.

[9]Also see *Sorenson v. Bellingham,* 80 Wn.2d 547, 496 P.2d 512 (1972), in contrast with *Swanson v. Kramer,* 82 Wn.2d 511, 512 P.2d 721 (1973). The Alaska Supreme Court has indicated that no "fundamental" right of candidacy for public office exists. *Gilbert v. State,* 526 P.2d 1131 (Alaska 1974).

Washington's statutory scheme, embodied in RCW 29.18.110 is not only rational, but necessary to achieve this compelling state interest. Voters in the primary election have an opportunity to express their support for an entire minor party. Due to the blanket primary system,[10] voters also have an opportunity to show support for an individual candidate. The level of support required—one percent—is considerably lower than the five percent requirement upheld in *Jenness v. Fortson, supra.*[11]

Another aspect of the strict scrutiny test is that states must adopt the least drastic means to achieve their ends. *Lubin v. Panish, supra.* As discussed above, the legislature in amending RCW 29.18.110 has made it easier for voters to demonstrate support for minor parties enabling them to qualify for the general election ballot.

The current Washington scheme fulfills the least drastic criteria. The one percent primary vote requirement does not discriminate against minor parties as did the pre-1977 scheme. Voters are not forced into choosing to attend a minor party convention and thereby giving up an opportunity to vote for candidates either not nominated by the minor party or for candidates in races where the minor party had no nominee.

One alternative to the pre-1977 scheme was to increase the minor party convention requirements. But this also would have been more drastic than the one percent primary vote requirement. The requirements in RCW 29.18.110 were the least drastic means available.

In making the "least drastic" determination the court has also focused on whether the statutory scheme

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[10]See infra. at pp. 10, 11.

[11]The signature requirement in *Jenness v. Fortson, supra,* was five percent of the number of registered voters at the last general election. The one percent requirement of RCW 29.18.110 is based on the number of votes cast at the primary for all candidates for the position sought. Washington's requirement is considerably less since not all registered voters vote at primary elections.

operates as a complete bar to ballot access. Compare *Williams v. Rhodes, supra,* with *Jenness v. Fortson, supra,* and *American Party of Texas v. White, supra.* The nominating petition signature requirement in *Jenness* was upheld in part because write-in candidacy remained an alternative method of ballot access. The Court stated:

> It is to be noted that these [statutory] procedures relate only to the right to have the name of a candidate or a nominee of a "political body" printed on the ballot. There is no limitation whatever, procedural or substantive, on the right of a voter to write in on the ballot the name of the candidate of his choice and to have that write-in vote counted.

Jenness v. Fortson, supra, at 403 U.S. at 434.

The same is true of Washington's statutory scheme. See RCW 29.51.170; *Swanson v. Kramer,* 82 Wn.2d 511, 517, 512 P.2d 721 (1973). The challenged statute does not operate to completely bar minor parties from ballot access.

C. Michigan's Scheme is Distinguishable

Plaintiffs place heavy reliance upon *Socialist Worker's Party v. Secretary of State,* 412 Mich. 571, 317 N.W. 2d 1 (1982). The Michigan election scheme invalidated in that case placed a greater burden upon minor parties to qualify for the general election ballot that does Washington's scheme.

In general, a primary system can be one of three types: (1) a closed primary, (2) an open primary, or (3) a blanket primary. A closed primary is identified by registered voters of a particular party only being able to vote for candidates of their party. An open primary allows voters to vote a party ticket of any party, but they can vote for the candidates of only one party. A blanket primary allows voters to vote for one candidate position, regardless of party affiliation. See Mifflin, "Open Versus Closed Primaries: A Dilemna in the Illinois Election Process,"

1977 Southern Illinois University Law Journal, no. 1, p. 210, 218-221.

Michigan has an open primary system. Voters may vote for the candidates of one political party only or for the appearance of one new political party on the general election ballot. See MSA § § 6.1560(2)(3); 6.1575; 6.1576; *Socialist Workers Party v. Secretary of State, supra,* 317 N.W.2d at 3.

Washington has a blanket primary system. See RCW 29.18.200; 29.51.090. A voter may vote for any candidate for each position, regardless of the voter's or the candidate's party affiliation.

The result of Michigan's open primary system is more burdensome upon minor parties. Voters are more likely to vote a party ticket that contains a full slate of candidates for each available position. Major parties traditionally produce such a full slate, whereas minor parties do not. This penalizes minor parties.

In Washington, this danger is not present. The voter is presented with the full slate of candidates. A minor party candidate can be chosen for one position and a major party candidate can be chosen for positions where minor parties do not offer a nominee. Thus the burdens upon minor and major parties are equalized, and no equal protection violation is presented. *Anderson v. Millikin,* 186 Wash. 602, 59 P.2d 295 (1936). Moreover, the blanket primary is the least drastic means available to promote the legitimate state interest in allowing voters to support the candidates of their choice. *Heavey v. Chapman,* 93 Wn.2d 700, 705, 611 P.2d 1256 (1980).

In the case of the U.S. Senate vacancy at issue here, a special primary was conducted in Washington on October 11, and the only position on that primary ballot was for U.S. Senate. Voters were free to vote for any of the thirty-three candidates, including plaintiff Dean Peoples.

In a blanket primary system, such as Washington's, voters are not faced with statutorily limited ballot choices. Thus the gravamen of the Michigan Supreme

Court's decision in *Socialist Worker's Party v. Secretary of State, supra,* is not presented here.

VI. CONCLUSION

Minimum scrutiny is the proper standard of review in this matter. Under that standard, RCW 29.18.110 is rationally related to the legitimate state interest in restricting ballot access to candidates with demonstrated public support. The best method of demonstrating voter support is the primary vote.

Assuming arguendo that strict scrutiny review is proper, RCW 29.18.110 also meets that test. It is necessary to achieve the compelling state interest which Washington has in protecting the integrity of the election process by requiring some measure of public support from candidates. The primary vote requirement of RCW 29.18.110 is less drastic than the pre-1977 scheme, and is less drastic than the alternative of increased minor party convention requirements. In enacting RCW 29.18.110 the legislature made it easier for minor parties to qualify for the general election ballot. Several minor party candidates have so qualified under RCW 29.18.110.

Finally, due to the major differences in ballot access under the Michigan and Washington schemes, *Socialist Worker's Party v. Secretary of State, supra,* is not controlling in this case.

Defendant respectfully requests that summary judgment be rendered in its favor, and that an order of dismissal be entered.

DATED this 9th day of December, 1983.

KENNETH O. EIKENBERRY
Attorney General

/s/ _____
Charles R. Hostnik
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

DEFENDANT'S REPLY TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

COMES Now Defendant Ralph Munro, Secretary of State of the State of Washington, by and through his attorney of record, Charles R. Hostnik, Assistant Attorney General, and hereby replies to both plaintiffs' Motion for Summary Judgment and the Memorandum in Support of Summary Judgment submitted by amicus curiae ACLU. This reply is supported by three exhibits appended hereto. Exhibit A is an Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment. Exhibits B and C are pertinent archived records of the Senate and House committees (respectively) that dealt with the 1977 revisions to minor party election procedures.

I. STANDARD OF REVIEW

Defendant reiterates that the strict scrutiny test is not appropriate in this case because fundamental rights are not impacted. The right to vote itself is not affected by RCW 29.18.110. That statute does not restrict plaintiffs' access to the polling place. Likewise, RCW 29.18.110 does not restrict plaintiffs' ability to associate as a minor

political party. Plaintiffs' are free to so associate regardless of that statute. In fact the statute enhances plaintiffs' right to associate. See infra at p. 7.

The only direct right affected by RCW 29.18.110 is the right of candidacy. That right has not been declared to be fundamental by the U.S. Supreme Court. See Defendant's Memorandum of Authorities in Support of Defendant's Motion for Summary Judgment at pp. 3, 7. Since the right of candidacy is not fundamental, strict scrutiny is not appropriate. The state need only show RCW 29.18.110 is rationally related to a legitimate state interest.

The state does not here rely on mere incantation of a proper state purpose. In enacting RCW 29.18.110 the state legislature was concerned with at least two purposes: (1) enhancing the participation of minor parties in the election process, and (2) ensuring that minor parties had demonstrable public support. See Exhibit B, p. 13; Exhibit C, p. 2.

Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent. *McDonald v. Board of Election,* 394 U.S. 802, 809, 22 L.Ed.2d 739, 89 S.Ct. 1404 (1968). Although the reported legislative history is scant concerning the purposes for enactment of the 1977 amendments, Senate and House committee records are helpful in this regard. See Exhibits B, C. Furthermore, grounds to exist to justify RCW 29.18.110. Clearly, the legislature intended to require minor parties to demonstrate some measure of public support, otherwise no reason would exist for placing those parties on the primary ballot.

II. THE 1977 AMENDMENTS AS ENACTED WERE THE LEAST RESTRICTING MEANS TO ACCOMPLISH THE STATE INTERESTS

Amicus curiae ACLU contends that the House ver-

sion of the 1977 amendments was less restrictive of the right to vote than the enacted version. Amici therefore concludes that RCW 29.18.110 was not the least restrictive means to accomplish the state interests and thus must be invalidated. See Amicus Curiae Memorandum in Support of Motion for Summary Judgment at pp. 8, 9. This analysis is flawed.

The provision relief upon by amicus is section 5 of the House version:

> The signature of a ((~~minor party~~)) *convention* nominating certificate of a person who voted in ((~~the primary~~)) *any other convention* held on the day of the convention is invalid. *Persons who sign convention petitions shall not be entitled to vote in the primary of any major political party held in September of the same year as the convention. Such persons shall, however, be entitled to vote an absentee ballot for any nonpartisan primaries and ballot proposition elections which may be held concurrently with such partisan primaries . . . .*

House Journal, vol. 1, pp. 497, 498 (Engrossed Substitute Senate Bill No. 2032, sec. 5, as amended by the House Committee on Elections and Governmental Ethics). The language quoted above was passed by the House and sent to the Senate. See House Journal, vol. 2, p. 1424; Senate Journal, vol. 1, p. 1593.

The Senate refused to adopt the House version and a conference committee developed the version of the bill that was enacted. See Senate Journal, vol. 1, pp. 1611, 1612; vol 2, pp. 2534-2542; House Journal, vol. 2, pp. 1990-1996.

The conference committee version (which was the version enacted) altered section 5 of the House amendments:

> The signature ((~~of~~)) *on* a ((~~minor party~~)) *convention* nominating certificate of a person who ((~~voted~~)) *signed a nominating certificate* in ((~~the primary~~)) *any other convention* held on the day of the convention is invalid.

Senate Journal, vol. 2, p. 2536; House Journal, vol. 2, p. 1991 (Engrossed Substitute Senate Bill No. 2032, sec. 5).

The conference committee also proposed an amendment to RCW 29.18.110, which the House had not done:

> No *name of a* candidate for a partisan office shall ((~~be the party nominee~~)) *appear on the general election ballot* unless he receives a number of votes equal to at least ((~~five~~)) *one* percent of the total number cast for all candidates for the position sought. . . .

Senate Journal, vol. 2, p. 2537; House Journal, vol. 2, p. 1992 (Engrossed Substitute Senate Bill No. 2032, sec. 11).

In summary, the House version proposed a scheme whereby minor party candidates would be chosen at a nominating convention and placed directly on the general election ballot. The delegates who attended the convention could vote at the primary (1) for nonpartisan positions, and (2) for ballot propositions. Delegates could not vote in any partisan position races.

This scheme was similar to the then existing law. The scheme in effect prior to 1977 required minor party conventions, with the party candidate placed directly on the general election ballot. But minor party convention delegates were prohibited from voting in the primary for any position or proposition.[1]

The enacted version removed all restrictions on the right to vote. Minor party convention delegates were free to vote in the primary for partisan and nonpartisan positions as well as ballot propositions. The enacted version also equalized the treatment of major and minor parties by requiring all such candidates to receive a certain percentage of the vote before appearing on the general election ballot. That percentage was reduced from five percent to one percent in order to make it easier for

[1]This scheme was in fact challenged on the basis that it denied minor party convention delegates the right to vote. See Exhibit A, p. 2.

minor parties to qualify for general election ballot placement.[2]

None of the three schemes impact the right to associate. Minor parties are free to associate in any manner they please. The three schemes presented here do not restrict that right. In fact, the enacted version enhances that right. See infra at p. 7.

Two of the three schemes do restrict the fundamental right to vote. The pre-1977 scheme completely disenfranchised from the primary those voters who attended minor party conventions. The House version, while not a complete ban, still partially disenfranchised primary voters. Under the House version voters who attended minor party conventions were prohibited from voting in all partisan races. Both schemes directly restrict the fundamental right to vote.

But the enacted scheme does not disenfranchise a single voter, and places no restrictions on the right to vote. Removing restrictions on that right was a primary purpose of the legislature in revising the minor party election procedures. See Exhibit A, p. 3, Exhibit B, pp. 9, 12, 32; Exhibit C, pp. 2, 8. The enacted scheme is clearly the least restrictive alternative.

III. THE ENACTED SCHEME ENHANCES THE PARTICIPATION OF MINOR PARTIES IN THE ELECTION PROCESS

In 1977 the legislature enacted a scheme that makes it relatively easy for a minor party to qualify for placement on the primary ballot. The legislature further required the minor party to demonstrate some showing of public support in order to be placed on the general election ballot.

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[2]The enacted version was also less restrictive than the original Senate Bill, which would not have lowered the five percent requirement for placement on the general election ballot. See Exhibit B, p. 29. Another alternative would have reduced the requirement to two percent—still more restrictive than the enacted version. See Exhibit B, p. 30.

The Secretary of State's Office had received complaints prior to 1977 that the then existing election scheme effectively barred minor party participation in the election process until close to the general election. See Exhibit A, p. 2. Since minor parties were not involved in the primary, media and candidate's forums were not available to minor party candidates until after the primary. Thus opportunities to disseminate minor party views were nonexistent for essentially half of the election season.

By including minor party participation in the primary, those avenues of expression are thus available to minor parties to enable them to disperse their views. The legislature made a conscious effort to do this. See Exhibit A, p. 3; Exhibit C, p. 2.

Furthermore, a minor party who qualifies for the general election ballot under RCW 29.18.110 has greater legitimacy in the eyes of the public. It has demonstrated the necessary modicum of public support. The minor party enjoys an enhanced public image that will help it promote its ideas.

IV. CONCLUSION

For the reasons discussed above, defendant respectfully requests the court to render summary judgment in its favor and to enter an order of dismissal.

DATED this 29th day of December, 1983.

KENNETH O. EIKENBERRY
Attorney General

/s/ _____
Charles R. Hostnik
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

AFFIDAVIT OF DONALD F. WHITING IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

STATE OF WASHINGTON
} ss.
COUNTY OF THURSTON

I, DONALD F. WHITING, being first sworn, state as follows:

1. I am the supervisor of elections in the office of the Secretary of State for the State of Washington, a position which I have held since April, 1974. As such, I am primarily responsible for carrying out the duties of the Secretary of State as the chief elections officer for the State of Washington. I make this affidavit in support of Defendant's Motion for Summary Judgment and Dismissal.

2. Prior to 1977, the office of the Secretary of State routinely received complaints from voters about the fact that the minor party nominating laws in effect at that time prevented persons who attended minor party nominating conventions (on the day of the primary) from voting on the nonpartisan candidates and issues which appear on the primary ballot. We received complaints

from the minor party conventions because they would not be able to vote on these offices and issues at the primary.

Prior to the 1976 state general election, these complaints culminated in a suit in federal court by the American Constitution Party alleging that the minor party nominating process in this state violated the equal protection provisions of the U.S. Constitution in that minor party delegates could not vote in the primary. The suit requested an injunction requiring county auditors to provide voters who wanted to attend minor party conventions with special absentee ballots containing only nonpartisan offices and issues.

We also received complaints from the minor political parties who felt that requiring them to hold their nominating conventions on the day of the primary restricted their opportunity to campaign because the broadcast media was not obligated to provide equal time for minor party candidates before the primary.

The legislation which the Secretary of State proposed to the Legislature in 1977 was intended, in part, to eliminate these objectionable aspects of the existing minor party laws.

3. I was personally involved in drafting the departmental request legislation on minor party nominating procedures and the final conference committee bill that was approved by the Legislature in 1977. Prior to the 1976 session of the legislature, we met with representatives of active minor political parties and identified four major "problems" with the statutes that were in effect at that time:

1) The prohibition against voting at the primary if an individual attended a minor party nominating convention;

2) The lack of a continuing legal existence of the minor party from one election to the next and the failure of minor party candidates to receive press attention until after the primary;

3) The difficulties encountered by county auditors in

preparing absentee ballots in a timely fashion (because minor party candidates could not be certified to them until two or three weeks after the primary); and

4) The difficulties encountered by the Secretary of State in producing and distributing the candidates pamphlet in a timely fashion (because information from minor party candidates was not available until two to three weeks after the primary).

Although individual senators and representatives frequently referred to, and even attacked, the Owl Party following the election in 1976, the drafters and prime sponsors of the legislation which was eventually approved by the Legislature were primarily concerned with the problems the existing minor party law caused for voters, election officials, and the minor parties themselves.

4. The House committee considered two alternative approaches to reforming the minor party nominating procedures. One bill retained the nominating convention but moved it to the Saturday before the filing period (the minor party candidates would appear only on the general election ballot). Under the other bill the minor political party would be formed by petition, its candidates would file at the same time as major party candidates, and they would appear on the ballot at the primary. The House adopted the first of these two alternatives; the Senate adopted the second.

The conference committee appointed to resolve the differences between the House and Senate bills chose a combination of these two proposals, retaining the convention but incorporating the requirement that minor party candidates appear on the primary ballot so that minor parties would have the same chance for media exposure as major party candidates. In the same compromise bill, they reduced the percentage of votes a primary candidate must receive in order to have his or her name printed on the general election ballot from five percent to one percent. Although this percentage had to be chosen without the advantage of hindsight, the concensus at that

time was that a modest qualifying standard of this type would help those minor parties which had significant support distinguish themselves from less serious parties.

5. According to the records of this office, the number of minor parties or independent candidate nominations for the past four presidential and non-presidential even-year elections are as follows:

Presidential Elections	Non-Presidential Elections
1980 – 8	1982 – 5
1976 – 12	1978 – 3
1972 – 7	1974 – 3
1968 – 6	1970 – 2

6. In the 1976, 1980, 1982, and 1983, the Socialist Workers Party nominated a candidate to the office of United States Senator. The votes for those candidates are as follows:

Year	Name Of Candidate	Votes Received	Percent Of Votes Cast For The Office
1976	Karl Bermann	7,402	.50%
1980	James Levitt	4,250	.45%
1982	Christopher Remple	3,006	.44%
1983	Dean Peoples	596	.08%

The Socialist Workers Party, Libertarian Party, and Free Peoples Party have had little difficulty meeting the requirements for formation of a party and little difficulty placing candidates for congressional and legislative office on the state general election ballot, but they have not been successful at qualifying candidates for the state general election ballot for statewide offices, such as U.S. Senate.

7. According to the records of this office, the voter turnout as a percent of registered voters for the past six even-year state primary and state general elections is as follows:

Presidential Elections			Non-Presidential Elections		
Year	Primary	General	Year	Primary	General
1980	48%	79%	1982	35%	62%
1976	44%	77%	1978	29%	52%
1972	49%	77%	1974	27%	55%

/s/ _____
Donald F. Whiting

Subscribed and sworn to before me this 29th day December, 1983.

/s/ _____
Notary Public in and for the State of Washington, residing at Olympia

PAGES 81-119 ARE OMITTED (Washington legislative materials including alternative bills, reports and correspondence) FROM THE JOINT APPENDIX.

These were omitted because, as printed, they did not comply with this Court's Rules. (The type was too small).

These materials are found in the record, from the District Court;Exhibits B and C to Defendant's Reply to Plaintiff Motion for Summary Judgement, CR-23.

Pages 81-119

While both the Senate and House proposals would correct the present provision, I am concerned that the present stalemate over the minor party process will result in no action being taken, and thus, no action to resolve the present constitutional problem. I therefore urge you, as the leader of your House, to urge cooperation between the Senate and House to resolve this matter.

Thank you for your time and attention.

Sincerely,

Bruce K. Chapman

xc: The Honorable Slade Gorton
The Honorable Gary Grant
The Honorable John Hawkins
Mr. Lyle Watson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

PLAINTIFFS' PROPOSED FINDINGS, CONCLUSIONS AND ORDER

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

This matter came on regularly for hearing before the Court on January 12, 1984, on cross-motions for summary judgment pursuant to Civil Rule 56 by Plaintiffs and Defendant. The parties both agreed that there were no disputed issues of material fact to be resolved, and each side asserted that they were entitled to the relief they requested as a matter of law.

Having considered the Pleadings, Memoranda of Law, the Affidavits of fact, the exhibits thereon, and the arguments of counsel, and being fully advised, the Court finds that summary judgment is appropriate under Rule 56, and enters the following:

FINDINGS OF FACT

1. Plaintiff Socialist Workers Party is a serious, non-frivolous, non-fraudulent, minor political party. Since its formation in 1938, the party has participated in the electoral process in the majority of the states of the union. It was regularly successful in placing its candidates on general election ballots in the State of Washington until the 1977 amendments to the minor party nomination

procedures which are the subject of this action.

2. In 1977, The Washington State Legislature amended the election laws in order to create additional barriers to minor party placement of candidates on the general election ballot. These amendments included the repeal of RCW 29.30.100, which previously provided for the general election ballot placement of the nominees of validly conducted minor party conventions pursuant to RCW 29.24. The amendment to RCW 29.18.020 put minor party candidates on the primary ballot instead of on the general election ballot. The amendment of RCW 29.18.110 barred the minor party nominees from the general election ballot unless they received in the primary election a number of votes equal to one percent of the total votes cast. An amendment to RCW 29.24.030 and .040, increasing the required number of attendees at minor party nominating certificates, is not challenged by the Plaintiffs, and requires minor party candidates to demonstrate a modicum of public support in order to have a valid nomination.

3. The effect of the 1977 amendments, as applied, has been to bar from the general election ballot in statewide races all minor party candidates, including the candidates of the Socialist Workers Party, from the effective date of the amendments through the present time.

4. The individual Plaintiffs Watson and Pitell are among the voters who wish to associate together to express their support for SWP candidates, including candidate Peoples, and the views that would be raised, debated and espoused in general election campaigns by SWP candidates. As a result of the effect in practice of the challenged new restrictions on minor party candidates, Plaintiffs have been limited to a choice of Democratic or Republican candidates on the general election ballot for statewide ballot.

5. Defendant Secretary of State, Ralph Munro, is the chief election officer of the State and has supervisory control over elections pursuant to R.C.W. 29.

6. The historical record indicates that for over eighty years prior to the 1977 amendments, minor parties were allowed to participate in statewide elections pursuant to the less restrictive convention nominating procedures for establishing a modicum of public support, as established by R.C.W. 29.24 and its predecessors. No evidence has been introduced to the record before this Court to establish any real or substantial voter confusion, clogging of the election machinery, or any other impairment of the integrity of the electoral process resulting from a proliferation of candidates, or from frivolous or fraudulent candidacies, which would justify additional restrictions on minor party ballot access.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter pursuant to the First and Fourteenth Amendments to the United States Constitution, 28 U.S.C. 1331, 1343, 1357, 2201, 2202 and 42 U.S.C. 1981 and 1982.

2. The challenged ballot access restrictions implicate fundamental rights, including rights of political association, political expression, and voting rights of the Plaintiffs.

3. There is insufficient evidence on the record to establish any real and substantial problem with clogging of the election machinery, voter confusion, fraudulent and frivolous candidacies, or any other impairment of the integrity of the electoral process, which would justify the challenged restrictions on fundamental rights of the Plaintiffs and similarly situated citizens of the State of Washington.

4. The historical record establishes a sufficiency of alternative, less restrictive, means to accomplish the legitimate state ends recited by Defendant in support of the challenged restrictions. Namely, the minor party nominating convention provisions of RCW 29.24, which are not challenged by Plaintiffs.

5. An evaluation of the historical record of the impact of the challenged restrictions, as applied, reveals that the restrictions have resulted in the total exclusion of minor party candidates from state-wide office since the effective challenged restrictions became effective in 1977.

6. Constitutional challenges to specific restrictions of a state's election laws cannot be resolved by any "litmus paper test" that will separate valid from invalid restrictions. The Court must consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the Plaintiffs seek to vindicate. The Court must identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by its rule. In passing judgment, the Court must both determine the legitimacy and strength of each of these interests, and also consider the extent to which these interests make it necessary to burden the Plaintiffs' rights. After weighing all these factors, it is clear to the Court that the challenged provision is unconstitutional.

7. "If the state has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper v. Pontikes,* 414 U.S. 51, 59 (1973). It is clear on the record before this Court that the more restrictive "double barrier" system established in 1977 was not justified by evidence which establishes the *necessity* of the additional burden on Plaintiffs' rights. Therefore, under the principles established by the controlling Supreme Court cases, the additional restrictions cannot stand.

8. Accordingly, judgment should issue declaring the challenged restrictions unconstitutional, and enjoining their enforcement in the future.

9. The Court will consider an application for reasonable attorneys fees by the prevailing party if brought before the Court on a separate motion.

ORDER

The provisions of R.C.W. 29.18.110, as applied to minor party candidates for statewide office, is hereby declared unconstitutional. Defendant is permanently enjoined from enforcing its one percent vote requirement for general election ballot access, as to minor party candidates lawfully nominated pursuant to the requirements of R.C.W. 29.24.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

ANSWER TO COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

COMES Now Defendant Ralph Munro, Secretary of State of the State of Washington, by and through his attorney of record, Charles R. Hostnik, Assistant Attorney General, and hereby provides the court with its answer to plaintiffs' complaint for declaratory and injunctive relief. In answer to plaintiffs' complaint, the defendant admits, denies and alleges as follows:

I. INTRODUCTION

Defendant admits that plaintiffs have brought an action for declaratory and injunctive relief. The defendant denies all other allegations contained in Paragraph I.

II. JURISDICTION

Defendant admits that this court has jurisdiction under the provisions of 28 U.S.C. Sections 1331, 1343, and 1357. Defendant denies that this court has jurisdiction under the First and Fourteenth Amendments to the United States Constitution, as well as 28 U.S.C. Sections 2201, 2202 and 42 U.S.C. Sections 1981, 1983, and

specifically alleges that those statutes are not jurisdictional statutes.

III. PLAINTIFFS

3.1 In answer to Paragraph 3.1 of plaintiffs' complaint, defendant is without knowledge sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies Paragraph 3.1.

3.2 In answer to Paragraph 3.2 of plaintiffs' complaint, defendant is without knowledge sufficient to form a belief as to the truth of the allegations contained therein, therefore, denies Paragraph 3.2.

3.3 In answer to Paragraph 3.3 of plaintiffs' complaint, defendant admits that Plaintiff Dean Peoples was the Socialist Workers Party candidate for United States Senate in the 1983 election. Defendant further admits that Plaintiff Dean Peoples will be excluded from the general election ballot. Defendant affirmatively alleges that Plaintiff Dean Peoples will be excluded from the general election ballot because he did not receive 1 percent of the total votes cast for the office of United States Senate in the 1983 election, and therefore does not qualify for general election ballot placement pursuant to the provisions of RCW 29.18.110.

IV. DEFENDANTS

In answer to Paragraph IV. of plaintiffs' complaint, defendant admits that Ralph Munro is the Secretary of State of the State of Washington. Defendant further admits that Defendant Ralph Munro is the Chief Elections Officer of the state pursuant to the provisions of RCW 29.04.070. Defendant denies that Defendant Ralph Munro has supervisory control over election officials in the performance of their duties.

V. FACTS

5.1 In answer to Paragraph 5.1 of plaintiffs' complaint, defendant admits that Socialist Workers Party candidates have appeared on the Washington State ballot in every presidential election but one since 1948, including the 1980 presidential election. Defendant affirmatively alleges that since the State of Washington does not have a presidential primary, minor party candidates are automatically placed on the general election ballot, notwithstanding the provisions of RCW 29.18.110.

5.2 In answer to Paragraph 5.2 of plaintiffs' complaint, defendant admits that other minor parties have also availed themselves of the same method of qualification for the general election ballot. Defendant denies the remainder of Paragraph 5.2 of plaintiffs' complaint, and affirmatively alleges that the pre 1977 minor party nomination procedures did not function successfully and did impair the integrity of the electoral process, which was the reason that the legislature sought to amend the minor party nomination procedure in 1977.

5.3 In answer to Paragraph 5.3 of plaintiffs' complaint, defendant admits the same and affirmatively alleges that the provisions of Laws of 1977, 1st Ex. Sess., Chapter 329, Section 11, in amending RCW 29.18.110 reduced the qualifying percentage from 5 percent to 1 percent specifically for the benefit of minor parties. Defendant further affirmatively alleges that the 1977 amendments to the minor party nominating procedure contained in Laws of 1977, 1st Ex. Sess., Chapter 329, operated to place minor parties on the primary ballot specifically in order to increase their opportunity to campaign and to increase their exposure to the public and media.

5.4 In answer to Paragraph 5.4 of plaintiffs' complaint, defendant is without information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5.4, and therefore denies the same.

5.5 In answer to Paragraph 5.5 of plaintiffs' complaint, defendant admits the same on information and belief.

5.6 In answer to Paragraph 5.6 of plaintiffs' complaint, defendant denies the same.

5.7 In answer to Paragraph 5.7 of plaintiffs' complaint, defendant admits that since 1977 from one to several minor parties have qualified for placement on the primary election ballot by fulfilling the requirements contained in Chapter 29.24 RCW. Defendant denies the remainder of Paragraph 5.7 of plaintiffs' complaint. Defendant affirmatively alleges that the 1977 amendments to RCW 29.18.110 do not bar any minor party candidates from placement on the general election ballot, because of the write-in provisions of RCW 29.51.170.

VI. DENIAL OF BALLOT ACCESS AND EFFECTIVE VOTE

6.1 In answer to Paragraph 6.1 of plaintiffs' complaint, defendant denies the same, and affirmatively alleges that RCW 29.18.110 does not create an insurmountable barrier to minor party placement on the general election ballot, due to the provisions of RCW 29.51.170. Defendant further affirmatively alleges that minor party access to public forms, debates, news media coverage, and other avenues of reaching the electorate with its ideas, and its right to associate the advancements of these ideas and to increase its electoral support, are in fact enhanced by the 1977 amendments to the minor party nomination procedure.

6.2 In answer to Paragraph 6.2 of plaintiffs' complaint, defendant denies the same, and hereby incorporates by reference the affirmative allegations made by defendant in response to Paragraph 6.1 of plaintiffs' complaint.

VII. CONSTITUTIONAL VIOLATIONS

7.1 In response to Paragraph 7.1 of plaintiffs' complaint, defendant denies the same.

VIII. PRELIMINARY RELIEF REQUIRED

In response to Paragraph VIII. of plaintiffs' complaint, defendant denies the same. Defendant affirmatively alleges that plaintiffs do have an adequate remedy other than this lawsuit, and that remedy is to utilize the write-in provisions of RCW 29.51.170. Defendants further affirmatively allege that if plaintiffs are granted the preliminary relief they request, the balance of hardships weighs heavily in defendant's favor because many Washington voters will be disenfranchised due to the fact they will not receive a new absentee ballot in time to have their vote counted in a November 8 general election.

WHEREFORE, defendant having fully answered plaintiffs' complaint, hereby requests the following relief:

1. For an order and judgment denying plaintiffs' prayer for relief and dismissal of plaintiffs' complaint with prejudice.

2. For defendant's costs and fees as provided by statute.

3. For defendant's reasonable attorneys fees as permitted by law.

4. For such other relief as the court may deem just and equitable.

DATED this 16th day of February, 1984.

KENNETH O. EIKENBERRY
Attorney General

/s/ _____
Charles R. Hostnik
Assistant Attorney General
Attorney for Defendnat Ralph Munro

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

DEFENDANT'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER

SOCIALIST WORKERS PARTY, et al.,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON,
RALPH MUNRO,

Defendant.

FINDINGS OF FACT

I. IDENTITY OF PARTIES

1. Plaintiff Socialist Workers Party is a minor political party in the State of Washington, and has active branches in other states. [Plaintiffs' Affidavit of Ivan King, pp. 1, 2]

2. Plaintiff Dean Peoples was the Socialist Workers Party candidate for U.S. Senate in the 1983 election. [Plaintiffs' Affidavit of Dean Peoples, p. 1]

3. Plaintiffs Leroy Watson and Louise Pittell are apparently registered voters of the State of Washington.

4. Defendant Ralph Munro is the Secretary of State of the State of Washington.

II. PROCEEDINGS

5. A vacancy in the U.S. Senate was created by the death of Henry M. Jackson on September 1, 1983.

6. Due to the timing of that vacancy, the legislature was called into special session on September 10, 1983 and enacted a measure calling for a special primary election

on October 11, 1983. [Plaintiffs' Affidavit of Lisa Hickler, p. 3]

7. Plaintiff Dean Peoples was chosen as the candidate of the Socialist Workers Party at a street corner convention conducted on September 16, 1983. [P-I article Sept. 17, 1983, appended to Plaintiffs' Affidavit of Lisa Hickler]

8. The Office of the Secretary of State verified the necessary number of signatures on the certificate of nomination submitted by the Socialist Workers Party, and certified the name of Dean Peoples to appear on the primary election ballot. [Defendant's Affidavit of Donald F. Whiting, 2. 2]

9. Dean Peoples received 596 votes in the special primary election conducted on October 11, 1983. [Defendant's Affidavit of Donald F. Whiting, p. 5]

10. The number of votes cast in the special October 11 primary was 681,690. [Defendant's Affidavit of Donald F. Whiting, p. 5]

11. Plaintiff Dean Peoples did not receive enough votes in the primary election to have his name placed on the general election ballot. [Defendant's Affidavit of Donald F. Whiting, p. 5]

12. Plaintiffs instituted this action and sought a show cause hearing on why a preliminary injunction requiring defendant to print the name of Dean Peoples on the general election ballot should not be granted.

13. The show cause hearing was conducted October 26, 1983 and the preliminary injunction request was denied.

14. This matter was argued on January 12, 1984 pursuant to cross-motions for summary judgment filed by both plaintiffs and defendant.

III. PRE-1977 MINOR PARTY ELECTION PROCESS

15. Plaintiffs challenge the provisions of RCW 29.18.110, which requires candidates for partisan office to

obtain one percent of the vote at the primary election in order to have the candidate's name printed on the general election ballot.

16. That statute is part of a minor party election process last amended in 1977.

17. The pre-1977 election process was criticized on the basis that persons who attended minor party nominating conventions, which were required to be conducted on the day of the primary election, were prevented from voting for the nonpartisan candidates and issues that appeared on the primary ballot. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Exhibit A, p. 2]

18. The defendant Secretary of State received complaints from minor parties that under the pre-1977 election process voters were reluctant to attend minor party conventions because they would not be able to vote on nonpartisan offices and issues at the primary. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 2]

19. The American Constitution Party filed suit against defendant Secretary of State in 1976 alleging that the pre-1977 minor party nominating process in Washington violated the equal protection provisions of the U.S. Constitution in that minor party nominating convention delegates could not vote in the primary election. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 2]

20. Minor parties also complained to the Secretary of State that under the pre-1977 process the requirements that their nominating conventions be conducted on the same day as the primary election restricted their opportunity to campaign because the broadcast media was not obligated to provide equal time for minor party candidates before the primary. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 2]

IV. ALTERNATIVE METHODS

21. Due to the foregoing complaints and problems of the pre-1977 minor party nominating procedure, the drafters and prime sponsors of the legislation which was eventually approved by the legislature were primarily concerned with the problems the existing minor party law caused for voters, election officials, and the minor parties themselves. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 4]

22. Two alternative approaches to reforming the minor party nominating process were considered by the legislature. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 4]

23. One bill retained the nominating convention, but moved it to the Saturday before the filing period. This approach contemplated that minor party candidates would appear only on the general election ballot. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 4]

24. The second approach required minor parties to be formed by petition, its candidates to file at the same time as major party candidates, and those candidates would appear on the primary ballot. [Defendant's Affidavit of Donald F. Whiting, in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 4]

25. The State House of Representatives adopted the first approach and the State Senate adopted the second approach. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 4]

26. A conference committee was appointed to resolve the differences between the House and Senate bills. The committee chose a combination of the two approaches, retaining the convention but incorporating the requirement that minor party candidates appear on the primary

ballot so that minor parties would have the same chance for media exposure as major party candidates. The committee also reduced the percentage of votes a primary candidate must receive in order to have his or her name printed on the general election ballot from five percent to one percent. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 4]

27. The conference committee version of the revised minor party nominating procedure was enacted by the legislature. [Laws of 1977, 1st Ex. Sess., ch. 329]

28. Based on the returns of the 1976 state general elections, eight of the twelve minor political parties which nominated candidates in 1976 would have qualified candidates for the general election ballot under the conference committee revised process. These eight minor political parties had a candidate that received more than one percent of the votes cast for the position sought. [defend's Reply to Plaintiffs' Motion for Summary Judgment: Exhibit B, p. 13; Exhibit C, pp. 5-7]

V. ELECTION RESULTS SINCE 1977

29. In 1978 there were no partisan statewide offices on the ballot at either the primary or general election. [Defendant's Affidavit of Donald F. Whiting, p. 2]

30. In 1980 non-major party candidates were nominated for three offices. The official results were as follows:

	Primary	General
UNITED STATES SENATE		
Gorton (R)	313,560	936,317
Magnuson (D)	348,471	792,052
Stokes (D)	18,348	
Levitt (SW)	4,250	
McCallum (R)	13,736	
McClain (R)	7,112	
Patric (D)	10,157	
Cooney (R)	229,178	
Kenney (L)	7,951	
	953,763	

Votes need to qualify for the general—9,528

	Primary	General
GOVERNOR		
Berentson (R)	154,724	
McGowan (R)	7,324	
Chapman (R)	70,875	
Ray (D)	234,252	
Bockman (SW)	2,833	
Spellman (R)	162,426	981,083
Diamond (D)	4,184	
Saluteen (R)	2,622	
McDermott (D)	321,256	749,813
Bestle (D)	2,481	
Baldwin (D)	3,578	
Jaisun (D)	1,476	
Isley (D)	2,723	
Sutich (R)	1,606	
	972,360	

Votes needed to qualify for the general—9,724

	Primary	General
ATTORNEY GENERAL		
Rosellini (D)	234,266	262,281
Miller (IC)	115,570	631,415
Neukom (D)	79,330	
Eikenberry (R)	284,459	769,116
Kaul (R)	39,178	
McCabe (D)	69,436	
Redman (D)	62,695	
	884,934	

Votes needed to qualify for the general—8,850

[Defendant's Affidavit of Donald F. Whiting, pp. 2, 3]

31. In 1982, the only partisan state-wide office on the ballot was for U.S. Senate. three non-major party candidates were nominated for that office. The official results were as follows:

	Primary	General
UNITED STATES SENATE		
Jackson (D)	450,580	943,655
Remple (SW)	3,006	
Lysen (IC)	31,186	72,297

Arthur Bauder (D)	4,762	
David (D)	6,764	
Stokes (D)	7,101	
Stites (R)	7,542	
Penberthy (R)	46,037	
Chiang (IC)	12,514	20,251
Doug Jewett (R)	73,616	332,273
McGowan (R)	13,054	
Privette (R)	3,221	
Patric (D)	5,408	
Talbott (R)	15,581	
	680,372	

Votes needed to qualify for the general—6,804

[Defendant's Affidavit of Donald F. Whiting, p. 4]

32. In 1983 the U.S. Senate vacancy was again the only partisan state-wide office on the ballot. Only one minor party attempted to place a candidate on the ballot. The official results were as follows:

	Primary
UNITED STATES SENATE	
Evans (R)	250,046
Lowry (D)	179,509
Larry Penberthy (R)	1,642
Curdy (D)	1,206
Stockton (D)	312
Peterson (R)	573
Garrett (D)	362
Bauder (D)	240
Patric (R)	211
Blair (D)	428
Privette (D)	223
Thompson (R)	382
Siebel (D)	339
Gee (D)	341
Royer (D)	103,304
McKinney (D)	964
Hetrick (R)	269
Maze (D)	341
Fix (R)	701
Cooney (R)	133,799
Olmer (D)	1,032
Blubaugh (R)	188

Maine (R)	105
Staloch (D)	620
Landon (R)	324
Yohey (D)	763
Stites (R)	162
Fuller (D)	495
Pilson (D)	266
Peoples (SW)	596
Chappelle (D)	473
Schilling (D)	743
Higgins (R)	730
	681,690

Votes needed to qualify for the general—6,817

[Defendant's Affidavit of Donald F. Whiting, pp. 4, 5]

33. In 1976, 1980, 1982, and 1983 the Socialist Workers Party nominated a candidate to the office of United States Senate. The votes for those candidates were as follows:

Year	Name Of Candidate	Votes Received	Percent Of Votes Cast For The Office
1976	Karl Bermann	7,402	.50%
1980	James Levitt	4,250	.45%
1982	Christopher Remple	3,006	.44%
1983	Dean Peoples	596	.08%

[Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A., p. 5]

34. The Socialist Workers Party and other minor parties have been very successful at qualifying candidates for the general election ballot in congressional and legislative races for non-statewide offices. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 5]

CONCLUSIONS OF LAW

I. JURISDICTION

1. This court has jurisdiction over the parties and over the subject matter of this action pursuant to 28

U.S.C. § § 1331, 1343, and 1357.

2. The provisions of the First and Fourteenth Amendments to the United States Constitution do not confer jurisdiction on United States District Courts. *Kochhar v. Auburn University,* 304 F. Supp. 565 (M.D. Alabama 1969).

3. The provisions of 28 U.S.C. § § 2201 and 2202 are not jurisdictional statutes. *Jarrett v. Resor,* 426 F.2d 213 (9th Cir. 1970).

4. The provisions of 42 U.S.C. § § 1981 and 1983 also are not jurisdictional statutes. *Giles v. Equal Employment Opportunity Comm'n,* 520 F. Supp. 1198 (E.D. Missouri 1981).

II. PRELIMINARY MATTERS*

5. Defendant Ralph Munro, Secretary of State of the State of Washington is the State's chief election officer pursuant to the provisions of RCW 29.04.070.

6. Plaintiff Dean Peoples did not receive a sufficient number of votes in the primary election to qualify for placement on the general election ballot pursuant to the provisions of RCW 29.18.110.

III. ISSUE PRESENTED

7. The issue presented to this court is whether rights granted by either the First or Fourteen Amendments to the U.S. Constitution are violated by the requirement of RCW 29.18.110 that candidates for partisan political office must receive at least one percent of the total votes cast for the office in the primary election in order to qualify for placement on the general election ballot.

8. Plaintiffs do not challenge the constitutionality of RCW 29.18.110 on its face, but only challenge that statute as it applies to minor political parties, specifically, the Socialist Workers Party.

IV. STANDARD OF REVIEW

9. Plaintiffs assert violations of two constitutional rights—freedom of association, based on the First Amendment, and equal protection, based on the Fourteenth Amendment. These rights are normally asserted in ballot restriction cases. *See Williams v. Rhodes,* 393 U.S. 23, 21 L.Ed.2d 24, 89 S. Ct. 5, 45 Ohio Ops 2d 236 (1968); *Jenness v. Fortson,* 403 U.S. 431, 29 L.Ed.2d 554, 91 S. Ct. 1970 (1971); *American Party v. Texas v. White,* 415 U.S. 767, 39 L.Ed.2d 744, 94 S. Ct. 1296 (1974); *Storer v. Brown,* 415 U.S. 724, 39 L.Ed.2d 714, 94 S. Ct. 1274 (1974); *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 59 L.Ed.2d 230, 99 S. Ct. 983 (1979).

10. The standard used to review the challenged statute in ballot access cases hinges upon whether the interests involved are "fundamental." Not every limitation or incidental burden on ballot access is subject to a stringent standard of review. *Bullock v. Carter,* 405 U.S. 134, 31 L.Ed.2d 92, 92 S. Ct. 849 (1972).

11. If the interests are deemed to be fundamental, the State must show the classification is necessary to serve a compelling interest. If, however, the interests are not fundamental, minimum scrutiny is used to determine whether the statute has a rational relationship to a legitimate State interest. *Illinois State Board of Elections v. Socialist Workers Party, supra,* 440 U.S. at 184; Rada, Cardwell, and Friedman, "Access to the Ballot," The Urban Lawyer, vol. 13, p. 793 at 803.

12. The direct interest asserted by plaintiffs is the right of candidacy. Plaintiffs' purpose in filing this suit was to seek to have the name of the Socialist Workers Party candidate printed on the general election ballot. Moreover, the only direct right affected by RCW 29.18.110 is the right of candidacy.

13. The right of candidacy has not been recognized by the United States Supreme Court as a fundamental right. *Bullock v. Carter, supra,* 405 U.S. at 142, 143.

14. Since the right of candidacy is not fundamental, strict scrutiny is not appropriate in this case. The defendant Secretary of State need only show that RCW 29.18.110 is rationally related to a legitimate State interest. If this is demonstrated, the statute must be delcared constitutional.

V. LEGITIMATE STATE INTERESTS

15. The United States Supreme Court has identified various legitimate interests that a state has in regulating ballot access. Among these interests is a legitimate state interest in requiring a candidate to demonstrate a "significant modicum of support" within the voting community. *Jenness v. Fortson, supra,* 403 U.S. at 442.

16. The State of Washington, therefore, has a legitimate interest in regulating ballot access to those candidates who have shown they have a "significant modicum" of public support.

17. The question that remains is whether RCW 29.18.110 is a rational means of achieving this legitimate state interest.

VI. RATIONAL RELATIONSHIP

18. The provisions of chapter 29.84 RCW govern nominations of minor party and independent candidates. There is no difference in the nominating procedure between minor party candidates and independent candidates.

19. Since the 1977 amendments to the minor party nominating procedure, there have been only eight nominations of minor party candidates to State-wide office. Three of these eight candidates received a sufficient showing of public support to quality for the general election ballot under RCW 29.18.110.

20. Based on the 1976 election returns, eight of the twelve minor party candidates would have qualified for general election ballot placement under RCW 29.18.110.

21. Moreover, minor party candidates are guaranteed ballot access in primary elections under Washington's minor party nomination procedure. Under the proisons of chapter 29.24 RCW, the minor party chooses its candidates, and that candidate is placed automatically on the primary ballot.

22. The facts presented to this court demonstrate that the strength of the individual candidate is to a large extent responsible for whether that candidate qualifies for placement on the general election ballot. It is even possible for a minor party candidate to receive more votes than a major party candidate. *See* Finding of Fact 30 (Attorney General race).

23. RCW 29.18.110 rationally relates to the legitimate State interest of forcing candidates to demonstrate some measure of public support.

VII. ALTERNATIVE STANDARD OF REVIEW

24. Although the right of candidacy has not been declared to be a "fundamental" interest, the Supreme Court has indicated that the "right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters." *Lubin v. Panish,* 415 U.S. 709, 716, 39 L.Ed.2d 702, 94 S. Ct. 1315 (1974).

25. Lower federal courts have discussed the right to run for public office in terms of being "fundamental." *See Mancuso v. Taft,* 476 F.2d 187 (1st Cir. 1973); *Duncantell v. City of Houston, Texas,* 333 F. Supp. 973 (S.D. Tex. 1971).

26. Assuming the right to candidacy is a fundamental right, defendant Secretary of State must show that RCW 29.18.110 is necessary to serve a compelling State interest.

VIII. COMPELLING STATE INTEREST

27. As noted above, the State of Washington has a

legitimate interest in regulating ballot access to those candidates who have shown they have a "significant modicum" of public support. *See* Conclusions of Law 15, 16.

28. This State interest is not only legitimate, but is also a compelling State interest.

29. The question that remains is whether RCW 29.18.110 is necessary to achieve this compelling State interest.

IX. NECESSITY OF RCW 29.18.110

30. Minor party candidates are guaranteed ballot access in primary elections under Washington's minor party nomination procedure. Under the provisions of chapter 29.24 RCW, the minor party chooses its candidate, and that candidate is placed directly on the primary ballot. Therefore, this case does not present a situation where minor parties are totally barred from participation in elections.

31. Under Washington's blanket primary scheme, voters are free to express support for a minor party, or for a candidate of a minor party, without restrictions due to the voter's party affiliation.

32. Without RCW 29.18.110, the State would have no mechanism to achieve its compelling interest in requiring minor party candidates to demonstrate some measure of public support.

33. RCW 29.18.110 is necessary to achieve the State's compelling interest in requiring minor party candidates to demonstrate some measure of public support.

X. LEAST DRASTIC MEANS

34. The Supreme Court, under the strict scrutiny test, has required a challenged statute to be the least drastic means to achieve the desired ends. *Illinois State Board of Elections v. Socialist Workers Party, supra.*

35. The conference committee version of the 1977 amendments to the minor party nominating procedures was the least drastic of the alternative measures considered by the legislature. The conference committee version was the measure enacted and contained in RCW 29.18.110 in the form challenged here.

36. The enacted version of the 1977 amendments was also less restrictive than the pre-amendment minor party nominating procedure. The amended version removed all restrictions on the right to vote. Primary voters are now free to vote for any candidate for an office, regardless of whether they attended a minor party nominating convention. Under the pre-amendment version, primary voters who attended a minor party convention were prohibited from voting for any partisan positions on the ballot.

37. Moreover, RCW 29.18.110 does not operate to completely bar a minor party candidate from the general election ballot if the candidate did not receive one percent of the vote in the primary. That candidate still has access to the general election ballot via the write-in provisions of RCW 29.51.170.

38. The case of *Socialist Workers Party v. Secretary of State,* 412 Mich. 571, 317 N.W.2d 1 (1982) is not binding on this court. Even if it were, however, that case is distinguishable. Michigan has an open primary, which forces voters to vote a party ticket. Since the facts in this case show that minor parties traditionally have run less than a full slate of candidates, voters who wish to fully exercise their right to vote are more likely to vote a major party ticket. This places minor parties at a disadvantage that is not present in Washington's blanket primary system, where voters are free to vote for one candidate for each office, regardless of party.

39. RCW 29.18.110 is the least drastic means of accomplishing the State's compelling interest.

XI. CONCLUSION

40. RCW 29.18.110 either on its face or as applied does not bar minor party access to the ballot.

41. RCW 29.18.110 does not violate rights guaranteed by either the First or Fourteenth Amendments to the United States Constitution.

42. Accordingly, an order should be issued granting defendant's Motion for Summary Judgment.

ORDER

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is granted the Plaintiff's Motion for Summary Judgment is denied.

/s/ _____
HONORABLE JACK E. TANNER
United States District Judge

Submitted by:
KENNETH O. EIKENBERRY
Attorney

/s/ _____
Assistant Attorney General
Attorneys for Defendant
Dated: 2/16/84

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 84-3806

SUPPLEMENTAL CITATION 1984 WASHINGTON ELECTION RESULTS

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,
Plaintiffs-Appellants,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,
Defendant-Appellee.

I, Ralph Munro, Secretary of State of the State of Washington and custodian of its seal, do hereby certify that the attached is an accurate listing of those candidates filing declarations of candidacy and supplemental nominating petitions with this Office for the 1984 Washington State Primary, pursuant to RCW 29.24.040, together with indication of which of those candidates qualified to be placed on the general election ballot by virtue of having received at least one per cent (1%) of the votes cast for that office (pursuant to RCW 29.18.110).

DATED:

Given under my hand and the seal of the State of Washington, at Olympia, the State Capitol.

/s/ _____
LAURA ECKERT
Assistant Secretary of State

MINOR PARTY–INDEPENDENT CANDIDATES
STATE OF WASHINGTON
1984 ELECTION

Qualified For Primary	Qualified For General	Elected	Party/Affiliation	Name	Office
*	*		Libertarian	Karen ALLARD	State Rep., Dist. 26, pos. 1
*	*		Taxpayers	Duane ALTON	State Senate, Dist. 5
*	*		Libertarian	Mack BARNETTE	State Treasurer
*	*		Libertarian	Dan BLACHLY	U.S. Rep., 2nd Dist.
*	*		Libertarian	Dean BRITTAIN	State Rep., Dist. 40, pos. 1
*			Independent	Mark CALNEY	Governor
*	*		Populist	Gary FRANCO	U.S. Rep., 2nd Dist.
*			Socialist Workers	Cheryll HIDALGO	Governor
*	*		Independent	Wm. L. JENNINGS	Comm. Public Lands
*	*		Communist	Elmer KISTLER	State Rep., Dist. 37, pos. 1
*	*		Independent	Alan KRONSCHNABEL	County Commissioner Dist. 3 (Chelan)
*			Populist	Bob LEROY	Governor
*	*		Populist	Thorn LOVELACE	County County Dist. 6 (Pierce)
*	*		Socialist Workers	Mark MANNING	U.S. Rep., 7th District
*	*		Independent	James M. SCIDMORE	County Commissioner Dist. 1 (Skagit)
*	*	*	Independent	George TOUCHETTE	County Commissioner Dist. 2 (Columbia)

December 7, 1984

Clerk of Court
Court of Appeals
for the Ninth Circuit
P.O. Box 547
San Francisco, CA 94101

Re: *Socialist Workers Party et al. v. Secretary,*
CA NO. 84-3806

Dear Sir:

Pursuant to the Court's order of December 4, 1984, I am writing this response to the Appellee's Supplemental Citation on 1984 Washington State election results.

While Plaintiffs were served with the "Supplemental Citation" of facts alleged to support the state's position sometime after the beginning of the calendar on the date set for oral argument, Plaintiffs do not assert the obvious untimeliness as a reason to disregard any facts relevant to the issues of this case. The list submitted is obviously not an official record kept in the course of business, but rather something prepared by counsel or by the office of the Defendant himself for the purposes of litigation. It is likewise incomplete, giving no indication of the number of votes cast, or of the percentages gained by the various candidates in the assorted races on the list. Its import is therefore somewhat obscure.

There is one relevant point that can be drawn from this exhibit, however, which Plaintiffs wish to emphasize: *three out of the four candidates for statewide office were eliminated from the general election ballot by the challenged primary requirement.* This is consistent with the facts before the District Court, indicating that four out of the four previous minor party candidates for statewide office attempting to qualify had likewise been eliminated from the ballot. Adding the results together, the total result is that seven out of the eight minor party candi-

dates have been disqualified in statewise races. Plaintiffs have made clear from the beginning the object of the challenge:

> These amendments have since their adoption effectively barred all minor parties from participating in general election for state-wide office.

ER 1, 1, lines 19-21, Complaint for Declaratory And Injunctive Relief. This fact was admitted by the Defendants, in the Affidavit of Don Whiting, attached as an exhibit to their Memorandum in Support of Summary Judgment:

> [Minor parties] have not been successful at qualifying candidates for the state general election ballot for state-wide offices, such as U.S. Senate.

ER, Docket 16, Exhibit A, page 5, lines 24-26. Vote totals are set forth in the initial Affidavit of Don Whiting, Docket No. 7, Clerk's Papers (not in Excerpt of Record) 2-5. These figures show that only 4 candidates for statewide office between the enactment of the challenged amendments and the trial court hearing (Remple, Socialist Workers, '82 Senate; Levitt, Socialist Workers, '80 Senate; Kenney, Libertarian, '80 Senate; Bockman, Socialist Workers, '80 Governor) all of which were eliminated from the ballot. It has never been an issue that minor party candidates for local offices have usually been able to meet the one percent requirement, and congressional candidates about half the time. This in no way justifies the exclusionary rule in statewide races.

Our conclusion is that the "Supplemental Citation" of facts on appeal in no substantial way changes the import of the facts before the trial court. The state has failed to offer competent evidence sufficient to carry its heavy burden to justify the restrictions on First Amendment rights, either at the trial court or here. There is no basis for a remand, which would be futile. This court must make a *de novo* decision on the record before it. The

Plaintiffs' summary judgment motion should be granted and Defendants' should be denied.

Respectfully submitted,

SMITH & MIDGLEY
Professional Service Corporation

/s/ _____
Daniel Hoyt Smith
Of Attorneys for Plaintiffs

No. 85-656

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1985

SECRETARY OF STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Appellant,

v.

SOCIALIST WORKERS PARTY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLANT

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STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

QUESTIONS PRESENTED

Is the State of Washington's statutory requirement that a candidate for partisan office must receive 1% of the votes cast for that office in the primary election[1] in order to remain on the general election ballot a violation of the First and Fourteenth Amendments to the United States Constitution?

PARTIES

Appellant Ralph Munro is the Secretary of State of the State of Washington and the chief election officer of that State.

Appellees are the Socialist Workers' Party; Dean Peoples, who in the 1983 primary election was a candidate of that party for the United States Senate; Louise Pittell, a registered voter; and LeRoy Watson, a registered voter and a member of the Socialist Workers' Party.

[1]Washington has a "blanket primary", in which each primary ballot includes all candidates, and each voter may vote for candidates irrespective of party affiliation. There is no party registration of voters in Washington.

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No. 85-656

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BRIEF OF APPELLANT

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 765 F.2d 1417 (1985), and is reproduced as J.S. App. A. The Circuit Court judgment is reproduced as J.S. App. B.

The Findings, Conclusions of Law and Order of the United States District Court, Western District of Washington are unreported and are reproduced as J.S. App. C. The Summary Judgment of that Court is reproduced as J.S. App. D.

JURISDICTION

Jurisdiction of this Court is invoked by appeal pursuant to 29 U.S.C. 1254(2). This appeal was taken from a

judgment of the Court of Appeals for the Ninth Circuit which held unconstitutional a Washington state election statute as applied to statewide elective offices.

The Appeal was filed on October 8, 1985 (J.S. App. E). The Jurisdictional Statement was filed on October 15, 1985. Both were timely filed.

On January 13, 1986, this Court noted probable jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 4 of the United States Constitution:

> § 4 ELECTION OF SENATORS AND REPRESENTATIVES. The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; * * *

First Amendment of the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacibly to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, § 1 of the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Rev. Code § 29.18.110 reads as follows:

> No name of a candidate for a partisan office shall appear on the general election ballot unless he receives a number of votes equal to at least one percent of the total number cast for all candidates for the position sought: *Provided*, That only the name of the candidate who receives a plurality of the votes cast for the candidates of his party for any office shall appear on the general election ballot.

STATEMENT OF THE CASE

A. History of the Litigation

Washington State election laws provide for the filings of declarations of candidacy in the third week of July of each election year. Any qualified voter can file for office as a candidate of a major party.[2] Persons desiring to be elected as a minor party or independent candidate must be nominated by a convention held during the July filing week and obtain the requisite signatures on a nominating petition. When this litigation was commenced, 178 signatures were required for a statewide office, which number was based on the 1980 presidential election.[3]

All candidates for partisan office, whether of a major or minor party, are included on the state primary election ballot in the third week of September. Thereafter, a candidate who receives the plurality of the votes cast for the candidates of each party and who also receives at least 1% of the total votes cast in the primary for that office then appears on the November final election ballot.

Following the untimely death of a U.S. Senator on September 1, 1983, the Legislature authorized a special primary election for October 11, with the final election to occur on November 8, 1983. The appellee, Dean Peoples, qualified and was included in the primary election ballot for that office on October 11, in addition to 32 other candidates, viz; 18 Democrats and 14 Republicans. In that primary election, 681,690 votes were cast for the office of U.S. Senator, and appellee Peoples received 596 votes. That being fewer than the 1% requirement of RCW § 29.18.110, i.e., 6,817; he was statutorily not eligible to appear on the general election ballot scheduled for November 8.

---

[2] A "major party" is a party, one of whom's candidates received at least 5% of the total votes cast for any statewide office in the previous general election. Wash. Rev. Code § 29.01.090.

[3] There has not been any challenge to this requirement, with which minor parties must comply to obtain access to the primary election ballot.

This action was instituted in the Federal District Court for Western District of Washington on October 18, 1983 seeking declaratory and injunctive relief. (J.A. 1). Plaintiffs sought by preliminary injunction to require that the plaintiff Dean Peoples be included on the November 8, 1983 final election ballot for United States Senator. After hearing, the preliminary injunction requested was denied, in part because election plans, such as absentee ballot printing and distribution had already commenced. (Transcript 10-26-83. No order was ever formally entered.

Subsequently, on January 12, 1984, the matter came before the District Court on cross motions for summary judgment. (J.A. 10, 59) The Court entered Findings of Fact, Conclusions of Law and Order upholding the statutory 1% requirement. (J.S. App. C)

A timely appeal was taken to the Ninth Circuit Court of Appeals which heard argument and received a Supplement to the Record setting forth the success of minor party and independent candidates in the subsequent 1984 primary and general elections. (J.S. 145)

The Ninth Circuit held the 1% vote requirement of Wash. Rev. Code § 29.18.110 for appearing on the final election ballot to be unconstitutional as applied to statewide elective offices. That Court found the statute, as applied to statewide elective offices, violated the First and Fourteenth Amendments. (J.S. App. A)

Washington filed an appeal October 8, 1985. (J.S. App. E). A Jurisdictional Statement was filed with this Court (October 15, 1985). The Socialist Workers moved to dismiss or affirm (December 15, 1985).

On January 13, 1986, probable jurisdiction was noted.

B. **The Washington Election System**

Washington's election system has no provision for registration or other identification of voters by party.[4] Candidates for partisan office simply identify themselves as being affiliated with the political party of their choice. Candidates for those offices directly file for their desired

[4]The "membership" in the party referred to *infra*, is neither state sanctioned nor required; it is a voluntary matter between party and voter.

office and no party approval is required for filing under the banner of a "major political party." A "major political party" is a party which had any candidate for any statewide office receive 5% of the vote in the last general election. (Wash. Rev. Code § 29.01.090). Such major party candidates are automatically placed on the primary ballot (Wash. Rev. Code § 29.18.020).

Persons desiring to be candidates not under the banner of major parties, but rather under the banner of a minor party or as an independent, are nominated through a "party convention" which is "an assemblage of registered voters." (Wash. Rev. Code § 29.24.010). Those conventions are held the same week that the filings of candidacy for office are made. (Wash. Rev. Code § 29.24.020).

The "convention" requirement is not a separate organizational requirement, as indicated by the nomination of Peoples, which was a "*street corner convention*". (Dist. Ct. FOF, J.S. App. C-3). A required nominating petition, (convention "certificate") must have voter signatures equal to 0.01% of the voters who voted in the last presidential election in the jurisdiction with a minimum of twenty-five voter signatures. (Wash. Rev. Code § 29.24.030). A candidate for a statewide office in 1983, when this litigation was commenced, needed 178 voter signatures on the "certificate of nomination."

All candidates for partisan offices, be they of major parties or others, appear on the September primary ballot. Washington has a "blanket primary" in which voters may vote for their choice of any candidate, regardless of political affiliation and without a declaration of political adherence on the part of the voter. (Wash. Rev. Code § 29.18.200). For example, the voter may vote for a Socialist Workers' candidate for one office, a Republican for another, a Democrat for a third and so forth through the primary election ballot.

The Washington primary is later than many states, being held on the third Tuesday in September. (Wash. Rev. Code § 29.13.070). And the general election is held on the first Tuesday after the first Monday in November. (Wash. Rev. Code § 29.13.010).

To appear on the general election ballot for a partisan office, a candidate must out poll any other candidates of the same party and receive at least 1% of the votes cast for that office in the primary. (Wash. Rev. Code § 29.18.110). In the general election, write-in voting is allowed for any candidates other than those who lost a primary contest. (Wash. Rev. Code § 29.51.170.)[5]

It is the 1% qualifying provision which was challenged in this action. Before 1977, minor party candidates were nominated by conventions held the same day as the primary. Voters attending conventions were not allowed to vote in the primary (Prior Wash. Rev. Code § 29.24.040).[6] One hundred voters or ten voters per congressional district[7] were required to nominate (Prior Wash. Rev. Code § 29.24.030). The requirement to remain on the general election ballot was then 5% of the votes cast in the primary (Prior Wash. Rev. Code § 29.18.110). The 5% requirement applied only to "major party" nominees since minor parties and independents were not included on the primary ballot.

The Washington legislation in 1977 made changes in the election laws which included the process for minor parties. (chapter 329, Laws of 1977, 1st Ex. Session).

The convention for minor party/independent nominations was rescheduled from the day of the primary to the Saturday before the filing period. The prohibition of minor party convention nominators voting in the primary was removed. The number of voter signatures required for a nomination petition was changed from 100, to one signature for each 10,000 votes cast in the preceding presiden-

[5]The Court of Appeals' confusion on this issue, (J.S. App. A-5) is resolved by Washington's interpretation of this inartfully worded statute as a "sore losers" statute; only votes for a candidate who sought nomination and lost to another candidate are not to be counted. Write-in votes for a candidate who did not appear on the general election ballot because of failure to reach the 1% in the primary *are* counted.

[6]A lawsuit challenging this disqualification of minor party convention participants from voting in the primary was pending at the time of the 1977 amendments (J.A. 77). *See American Constitutional Party v. Munro*, 650 F.2d 184 (Ninth Circ. 1981).

[7]At that time Washington had seven congressional districts.

tial election. Minor party and independent candidates were added to the primary ballot. Finally, the requirement that a candidate must receive at least 5% of the primary votes for the office to remain on the general election ballot was reduced to 1%.

C. Minor Party and Independent Candidate Nominations in Washington

The relevance of the historical participation levels shall be discussed *infra*. The following summarizes the participation of the minor parties and independents in Washington.

The first table gives the total number of minor party and independent nominations. These numbers in the first column reflect the number of convention petitions filed with the Secretary of State. They are *not* the number of candidates since some qualifying parties have multiple candidates. (See Table 2 for candidates) Column 2 shows how many minor parties participated. (Independents have been subtracted). After 1977, this column is divided to show the number of minor parties on the primary and general election ballot.

TABLE I

	Minor Party/ Independent Petitions Filed	Minor Parties Represented in Election	
		Primary	General
1968	6		6
1970	4		4
1972	7		7
1974	9		9
1976	10		10
1978	6	4	3
1980	5	4	3
1982	8	4	3
1984	10	5	5

(J.A. 79 and State of Washington Abstract of Votes, Office of the Secretary of State)

All of the nominations listed in the first column resulted in placement of one or more candidates on the Washington ballot. After 1977, a place was guaranteed on

the primary election ballot, rather than on the general election ballot. To remain on the ballot for the general election, each *candidate* must now satisfy the 1% requirement.

In 1976, the year immediately preceding the adoption of the 1% requirement, the following 12 parties qualified and appeared on the Washington ballot (alphabetical):

1. American Independent
2. Bicentennial Reality
3. Communist
4. Democrat
5. Free Peoples'
6. Independent
7. Libertarian
8. OWL
9. Republican
10. Socialist Labor
11. Socialist Workers
12. U.S. Labor

The 1976 Washington election had the largest number of parties in history. It should also be noted that one party fielding a full "slate" of candidates for statewide office was avowedly frivolous; OWL was an acronym for the "Out With Logic Party".

The following summarizes the primary and general ballot participation of parties and candidates subject to the 1% requirement since the 1977 changes.[8] These numbers include county offices, state offices and U.S. Representatives and Senators:

TABLE II

	September Primary/ Minor Party Candidates	September Primary/ Independent Candidates	November General/ Minor Party Candidates	November General/ Independent Candidates
1978	12	2	8	2
1980*	11	2	8	2
1982	13	5	12	5
1984*	11	5	9	4

State of Washington, Abstract of Votes — *The 1980 and 1984 figures do not include Presidential candidates who only appear on the November general election ballot. In 1980 there were nine presidential candidates and ten in 1984.

[8]A supplement to the record was filed in the Circuit Court before argument giving the 1984 election figures.

In the 1984 election in Washington, the Socialist Workers' Party had candidates for President/Vice-President. Additionally, that party had two candidates in the primary for other offices; one for the U.S. House of Representatives, who qualified for general election ballot, and the other for Governor, did not. (J.A. 146).

In that same election, besides the two major parties, there were sixteen minor party and independent candidates on the September primary which included candidates from five minor parties. Of those candidates, the thirteen who qualified for the general election included representatives of all five minor parties. The three who did not achieve the 1% necessary to qualify for the general election were all candidates for Governor. Two candidates appeared on the general election ballot for statewide office, one being a minor party candidate and the other an independent. (J.A. 146).

SUMMARY OF ARGUMENT

In Washington, the primary election is:

> "* * * not merely an exercise or warm-up for the general election, but an integral part of the entire election process, the initial stage in a two-stage process in which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates."

Storer v. Brown, 415 U.S. 724 at 735 (1974) (describing the California primary).

The basic complaint of the Socialist Workers Party is that the Washington election system allows the voters to winnow out and reject a party's candidate in the primary election, with the result that unless its candidate receives a minimal qualifying vote in the primary there is no second chance in the general.

Thus there is a critical difference between this case and the previous ballot-access cases which have been before this Court — a difference which makes this case much easier. The previous cases have involved statutory qualifications which would keep a minor party or independent

candidate from appearing on the ballot at all. Unless those qualifications were met, the candidate would never appear on a ballot and the electorate would have no chance to accept or reject the candidate at the ballot box.

Here, however, the minor party or independent candidate faces no appreciable obstacle to appearing on the ballot at all. The candidate need only be nominated by a convention attended by a handful of voters — less than 200. That places the candidate on the ballot for the primary election, at which the voters can either accept or reject the candidate. If, however, the candidate is overwhelmingly rejected, i.e., receiving less than 1% of the total vote cast for that office in the primary, the candidate does not remain on the ballot for the general election. Unless a write-in campaign is mounted, there is no second chance to have voters express their approval or disapproval. For such a candidate who has been winnowed out by the voters, the election is over.

Thus, the difference between this case and previous cases is that here the candidate has already had a chance to take his message to the voters, in a primary election, and the question is whether there is constitutionally required a second chance to continue into the general. In the previous cases, failure to meet the statutory qualifications meant that there would be no chance at all to submit a candidacy to the voters.

This difference is important because of the nature of the constitutional interests which underlie this case. Those interests are based upon the interests of the electorate in having a robust and open debate on public issues, and a wide range of choice among candidates and the positions those candidates represent. *Anderson v. Celebrezze*, 460 U.S. 780 at 794 (1983). Closely related is the interest of the electorate in not allowing existing or "major" parties to monopolize the election process. *Ibid.* Washington's election system does not significantly impair those interests in any way. A new or minor party nominates by a convention attended by a minimal number of voters. In Washington a political party can qualify as a "major party" by obtaining 5% of the vote cast for a statewide office. Washington simply says that for those candidates who have been overwhelmingly rejected in the primary ballot, placement is not available in the general election, though write in is still possible.

Further, we do not rely solely upon this difference between Washington's system and those involved in previous cases. For even if the right of minor party and independent candidates under Washington law to gain almost automatic access to the primary ballot be set aside as constitutionally irrelevant, Washington's system would still pass constitutional muster under this Court's previous decisions. As those decisions make clear, the state has a right to require "* * * some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot * * *" *Jenness v. Fortson*, 403 U.S. 432, at 442 (1971). And the 1% requirement which Washington's system uses to measure that modicum of support is well within the numerical requirements upheld by this Court in *Jenness, supra*, and *American Party of Texas v. White*, 415 U.S. 767 (1974).

More is involved, however, than just a comparison of numerical requirements. We must also answer, in the context of Washington's system, the question raised in *Storer v. Brown, supra*: Could a "reasonably diligent" independent or minor party candidate be expected to meet those requirements? Or will it be only rarely that such a candidate will get on the ballot? *See Storer, supra*, at 415 U.S. at 742. To place a candidate on the primary ballot in Washington, of course, hardly any diligence is required at all; the candidate needs only a handful of voters — less than 200 — to attend the nominating convention. And even for the general election ballot, a reasonably diligent candidate, with a reasonably appealing campaign, can surely meet Washington's 1% requirement, as the history of minor party and independent candidates shows.

It must be recognized, however, that no matter how diligent a party or its candidate might be, that candidate can still be overwhelmingly rejected, simply because the voters find no merit in the political positions espoused by that party or candidate. The "reasonable diligence" stand-

ard, in short, should not be applied in a manner which eliminates a state's right to require a "modicum of support." *Jenness v. Fortson, supra,* 403 U.S. at 442. While reasonable diligence will assure that political positions are heard by a large group of voters, it will not always assure that these positions will be accepted.

ARGUMENT

A. Framework of Analysis.

Before examining the constitutionality of the specific electoral system here under challenge, we believe it useful to delineate the constitutional interests implicated by that challenge. Precisely whose constitutional interests are here involved? And, what are the nature and scope of those interests?

The answers to these questions will provide the necessary framework for our analysis of Washington's election system and for a determination as to whether that system should pass constitutional muster.

The State's Interest in Regulating Elections

The states have the constitutional authority and responsibility to conduct elections, including those for federal offices. *U.S. v. Gradwell,* 243 U.S. 476 at 484 (1916). Because of this responsibility, "it is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal", as this Court has previously recognized. *Rosario v. Rockefeller,* 410 U.S. 752 at 761. For the states to achieve that goal requires establishment of comprehensive election systems. Thus, in *Anderson* the Court recognized:

> * * * as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and have some sort of order, rather than chaos, in order to accompany the democratic process.
>
> (Citing *Storer v. Brown,* 415 U.S. 724 at 730).

In order to prevent the chaos and the consequent frustration of the democratic process which would result if any and all comers were able to place themselves on the

ballot, this authority of the states to regulate elections includes the power to place certain limits on ballot length and on candidate access.

> The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not.
>
> *Lubin v. Panish,* 415 U.S. 709 at 715 (1974).

As this language suggests, different states may provide quite different tests for determining the "seriousness" of political candidates. They may hold different views, as expressed in their election laws, as to what is a "reasonably" sized ballot, and what is a "reasonable" level of public support to be required to gain a place on the ballot. Such diversity of judgment by various states is but another manifestation of the wide diversity inherent in our federal system. And the remark made by this Court in a case upholding Puerto Rico's somewhat unusual system of filling vacancies to its legislature is applicable here:

> Puerto Rico, like a state, is an autonomous political entity sovereign over matters not ruled by the Constitution [citations omitted]. The methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth's electoral system are entitled to substantial deference.
>
> *Rivera-Rodriguez v. Popular Democratic Party,* 457 U.S. 1 at 8 (1982).

Stated even stronger:

> * * * absent some clear constitutional limitation, Puerto Rico is free to structure its political system to meet its special concerns and political circumstances.
>
> *Rivera-Rodriguez, supra,* 457 U.S. at 13, 14.[9]

---

[9]The court below noted that "[o]nly Washington employs the primary device to screen minor party candidates from the ballot." (J. S. A-8). The court seems to have treated this uniqueness as reason for viewing Washington's system as questionable, contrary to federal principles of allowing or encouraging variation between states. Also, a prior decision upholding a primary vote qualifying system, was summarily affirmed by this Court. *Hudler v. Austin,* 419 F. Supp. 1002 (E. D. Mich. 1976), summarily aff'd. sub nominum *Allen v. Austin,* 403 U.S. 924 (1977).

The flexibility and diversity afforded the states under our constitutional system unquestionably has, as recognized in *Rivera-Rodriguez* itself, certain limits. We shall examine subsequently where the Court has drawn the lines in applying those limits. See pp. 14-17, 19-21, *infra*. But before doing so, it is necessary to examine a more fundamental question, viz. the source of those limits, and the nature of the other constitutional interests which come into play.

The Voters' Interest In Associating For Political Purposes And In Having Candidates Of Their Choice.

In *Bullock v. Carter*, 405 U.S. 134 (1972), this Court struck down, as excessive, certain filing fees required to be paid, under Texas law, by a candidate in a primary election. In explaining the grounds for its decision, the Court addressed a threshold question which is of direct importance here. In determining the constitutionality of a state law which restricts access to the ballot, should the focus be upon the interests of the candidate? Or should it instead be upon the interests of those who might wish to vote for him? The Court stated:

> The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters. Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review. *McDonald v. Board of Election*, 394 U.S. 802 (1969). Texas does not place a condition on the exercise of the right to vote, nor does it quantitatively dilute votes that have been cast. Rather, the Texas system creates barriers to candidate access to the primary ballot, thereby tending to limit the field of candidates from which voters might choose. The existence of such barriers does not of itself compel close scrutiny. Compare *Jenness v. Fortson*, 403 U.S. 431 (1971) with *Williams v. Rhodes*, 393 U.S. 23 (1968). In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.

Bullock supra 405 U.S. at 142-143.

Accordingly, in keeping with the flexibility which the states enjoy in fashioning their election systems, restrictions upon a candidate's access to the election ballot do not automatically trigger the stringent "strict scrutiny" standard of review. Only when, as in *Williams v. Rhodes*, 393 U.S. 23 (1968), the election system erects a virtual bar between the minor party and the ballot box, and gives the minor party no reasonable chance at all to gain access to the ballot, is strict scrutiny to be applied.

Moreover, in examining those constitutional interests, the focus should be upon the interests of the voters themselves, rather than the interests of the individual candidates.

In *Williams supra*, the Court identified those interests as the right of voters to associate for political purposes by forming a party and the right to vote effectively:

> The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.

393 U.S. at 31.

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Court explained further the nature of these rights:

> A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties. *Clements v. Fashing, supra*, at 964-965 (plurality opinion). By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group,

such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new program; many of their challenges to the status quo have in time made their way into the political mainstream. *Illinois Elections Board v. Socialist Workers Party*, 440 U.S. at 186; *Sweezy v. New Hampshire*, 440 U.S. at 186; *Sweezy v. New Hampshire*, 354 U.S. 234, 250-251 (1957) (Opinion of Warren, C.J.).

In short, the primary values protected by the First Amendment—'*a profound national commitment* to the principle that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)—are served when election campaigns are not monopolized by the existing political parties. (Emphasis supplied).

Anderson thus sheds light on a critical question raised but unanswered by *Williams*. Surely, under *Anderson*, the right to vote does not mean that any candidate supported by a single voter has a constitutional guarantee of access to the ballot. So also, the right to associate for political purposes, by forming a party, surely does not mean that every party, no matter how small, must be given a similar guarantee. For this would lead to the very chaos and confusion which the State has a responsibility to prevent. See p. 12, *supra*. *Jenness v. Fortson*, 403 U.S. 432 (1971) and *American Party v. White*, 415 U.S. 767 (1974) confirm that *Williams* does not require any such result. But what constitutional interests should be looked to in drawing the line? *Anderson*, we suggest, tells us: The constitutional interests are predicated upon a full debate on public issues, and prevention of a monopoly by the existing political parties. Only when a State's election system seriously impinges upon these interests does it move into the danger zone.

Anderson similarly sheds light on the critical question here as well. In 1977, Washington decided to replace the virtually automatic access to the general election ballot which minor party and independent candidates had previously enjoyed. It decided that such candidates must now

make a showing of a "modicum of support" in the primary, in order to remain on the ballot in the general. *Jenness v. Fortson*, *supra*, 403 U.S. at 442. Virtually automatic access to the voters remained, through the primary election ballot.

Washington's decision, we shall next show, cannot realistically be viewed as seriously impinging upon the rights identified in *Williams supra*, and elaborated upon in *Anderson supra*. Rather, that decision represents an exercise of the flexibility which states constitutionally enjoy in fashioning their election systems.

B. Washington's System Does Not Impair Any Constitutionally Protected Interests. The Importance of Virtually Guaranteed Access To the Primary.

This case arose only after the Socialist Workers Party and its candidate, Mr. Peoples, had already appeared on the election ballot in Washington. All who wished to vote for him and his party had their chance to do so, and to vote against the two major parties. The total of those who voted for Mr. Peoples was less than a tenth of 1% of the total vote for the office which he was seeking, i.e., 596 out of 681,690 votes.

Exactly what accounts for this dramatically poor showing can only be surmised. One factor may have been that only $1,900 was spent on his campaign. (J. A. 30). Even in Washington, this is a miniscule amount for a statewide race for the U.S. Senate. And if it is indicative of the overall level of effort made in the campaign by the party and its candidate, the poor showing is not surprising.

Mr. Peoples thus did not even come close to the approximately 6,817 votes which he needed under the 1% requirement. And in evaluating that requirement, as applied to him and to all other minor party and independent candidates, it must be remembered that under Washington's unique system of a blanket primary, the primary is a political free-for-all. Indeed, the 1% requirement would be more difficult to meet without a blanket primary. But Washington has a blanket primary in which the voter can

switch parties for each different candidate on the primary ballot, thus, the voter can vote for a Republican candidate for the United States Senate, a Democratic candidate for the House of Representatives, an independent or minor party candidate for Governor, and back and forth, all the way down the ballot. This means, as a practical matter, that it is open to minor party and independent candidates to attract the votes of those who wish to vote for major party candidates for other offices. This is particularly important for minor parties who do not field a full slate of candidates for all offices. One can vote for their candidates, without foregoing the opportunity to vote for a candidate for every office.

Most importantly, the "free-for-all" character of Washington's blanket primary means that the major parties are not given any sort of monopoly. During the primary campaigns, minor parties and independent candidates have a wide-open opportunity to present their ideas to the voters, to engage in a robust, uninhibited public debate, and thus to win voter support on election day. In this manner, Washington's system fully preserves the important constitutional interests that are here at stake.

For this reason also, the case at bar is much easier than such prior cases as *Williams v. Rhodes*, 393 U.S. 23 (1968), *Jenness v. Fortson*, 403 U.S. 431 (1971), *Storer v. Brown*, 415 U.S. 724 (1974), and *American Party v. White*, 415 U.S. 767 (1974). Each of those cases involved a requirement that a certain number of voters sign nominating petitions before a minor party or candidate could be placed on the ballot at all. Without that initial voter support, the party or candidate would not appear on any ballot, and the voters would have no chance on election day to make a decision about that party or candidate. Here, however, only a handful of voters—less than 200—are needed to place the minor party or independent candidate on the primary ballot, and to give them access to the political fray.

Indeed, despite a superficial similarity, the claims of the minor parties and candidates in those previous cases are really quite different from the claim of the Appellees

here. The Appellees claim a right to have access to the general election ballot, even though their party and candidate have been overwhelmingly rejected by the voters in the primary. They are essentially complaining about a requirement that they face the voters in the primary and win a certain degree—1%—of the voters' support in order to face them again in the general. In a sense, their complaint is not about lack of access to the voters, but about a requirement of too much access. They wish to face the voters only once, and thus avoid the risk of initial rejection.

But even if the right, under Washington's system of virtually guaranteed access to the primary be set aside as irrelevant, and if the focus is only upon the right of access to the general election, Washington's system still meets the requirements established under this Court's prior decisions.

C. The Reasonableness of Washington's Requirement for Access to the General Election.

In Washington's integrated two-step election process, access to the second step, the general election, by minor party and independent candidates is less restrictive than under systems previously validated by this Court. In *Jenness v. Fortson*, 403 U.S. 431 (1971), the Court rejected a challenge to Georgia's election system under which ballot access was denied to independent candidates unless they filed a petition signed by at least 5% of the number of voters registered in the previous election.[10] The Court observed that "Georgia in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life." 403 U.S. at 439. And in upholding Georgia's system, the Court did not apply the "strict scrutiny" test,

[10] The federal statutory requirement for access to campaign financing upheld by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), chose the same 5% requirement in drawing the line between "new" and "minor" parties, of which only the latter would be entitled to public funding. This Court upheld that determination, analogizing it to the state's ability to limit the ballot to candidates with "demonstrable public support." 424 U.S. at 96. Such a limit served to avoid "facilitating hopeless candidates," 424 U.S. at 96, n. 129. This Court again recognized the "important public interest against providing artificial incentives to splintered parties and unrestrained factionalism." 424 U.S. at 96.

but rather a less stringent standard of review. As we have previously observed, at pp. 14, *supra*, the Court in *Bullock v. Carter*, 405 U.S. 134 (1972), expressly recognized that this less stringent standard was applied in *Jenness*.

Similarly, in *American Party v. White*, 415 U.S. 767 (1974), the Court rejected a challenge to a Texas election system under which any political party would be denied ballot access unless it either obtained 2% of the vote in the previous general election, or filed petitions signed by a number of registered voters equal to 1% of the total votes cast in that prior election.

The requirements of *Jenness* and *American Party* are more stringent than the 1% requirement challenged here, as can be shown by the following table. The various bases to which we apply the various percentages in that table are taken from Washington's 1984 election figures.

Total Washington Voters	Washington/ General Vote For Governor	Washington/ Primary Vote for Governor	Nomination Signatures for Governor to Appear on primary election
2,457,667	1,888,987	914,000	178* petition signatures
x 5% Approved in Jenness	x 1% Approved in American Party	x 1% (invalidated by court below)	
94,449 petition signatures	18,890 petition signatures	9,140 primary votes	

*This is based upon the 1980 vote, in 1988 194 signatures will be required as the 1984 vote cast increased over the 1980 total.

As this table shows, there are variations between the three systems with respect to the "pool" to which the particular percentage is applied. Under a *Jenness* type of system, it is the total number of registered voters; under an *American Party* system, it is the total votes cast for an office in a previous general election; and in Washington's system, it is the total votes cast for an office in the immediately proceeding primary. Washington's percentage is applied to the lowest of these three pools, i.e., the actual number of votes cast in the primary. As one would expect,

the primary turnout is less than that in the general. There is also a "fall off" as one moves down the ballot, so the number of votes for other statewide offices is even less.[11]

We do not rely, however, on just a comparison of various numerical requirements. One must examine other features of the system, to see if they unduly impede a minor party or independent candidate from remaining on the general election ballot. *See Williams v. Rhodes*, 393 U.S. 23 at 34 (1968). The Court should examine the "totality" of applicable election laws "taken as a whole."

We have already discussed, at pp. 17-18, *supra*, the fact that under Washington's unusual blanket primary system, the voter declares no party affiliation. Unlike the voter in the usual "closed" or "open" primary, one can switch parties, office by office, down the whole primary ballot. Thus every voter who goes to the polls in a primary election can be effectively appealed to by the minor party or independent candidate, with no risk that by supporting such candidates, the voter will give up the right to vote for candidates for other offices.

Another important factor in evaluating the system, of course, is the matter of deadlines. While the degree of voter support required by the system might be entirely reasonable, the time period for garnering that support might not. *Cf., Mandel v. Bradley*, 432 U.S. 173 (1977).

In Washington, the filing deadlines for minor party and independent candidates are approximately the same as for major party candidates; they are within the same week. *See* p. 5, *supra*. All candidates thus have from the third week in July until the third week in September in which to campaign for support. And indeed, there is no reason why they cannot start will before then, if they so wish. Washington's system thus imposes no unrealistic or unreasonable deadlines.

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[11] We are not here suggesting, of course, that the task of the candidate or party becomes actually easier as the base diminishes. For the pool of voters from which that 1% requirement must be met is diminishing too, as noted by the court below. (See J.S. A-8) But what that court failed to recognize is that the diminishing bases cuts two ways, not just one way.

The court below, however, faulted Washington's system in this regard. It emphasized that "* * * a primary vote system for a minor party nominee has the inherent effect of establishing a relatively early deadline," thereby preventing independent-minded voters from basing their choice on subsequent events. (J.S. A-8.) But this completely overlooks the fact that the deadlines for gathering signatures under the Georgia and Texas systems involved in *Jenness* and *American Party, supra,* were much *earlier* than the deadline established by Washington's primary election. In *Jenness,* the deadline was the second Wednesday in June. See 403 U.S. at 434, 435. In *American Party,* it was the 30th of June. See 415 U.S. at 778. In Washington, the 1% vote requirement occurs on the third Tuesday of *September.*

Lastly, we ask: What has been the effect of Washington's system on minor party and independent candidates? The results are found in Tables I and II, pp. 7 and 8, *supra.* While these results show, in our view, no precise pattern, some general conclusions seem warranted. First, the 1977 change appears to have reduced the wide proliferation of minor party participation in November general elections, as exemplified by the 10 minor parties appearing on the 1976 general election ballot. (See column 3 of Table I.) And this is probably as the legislature intended. In terms of numbers of minor party *candidates,* there is wide participation in both the September primary and November general elections. After the 1977 change, the number of minor party candidates appearing on the November general election ballot ranged from a minimum of 8 to a maximum of 12. (See column 3 of Table II, p. 8, *supra.*) And additionally, independent candidates ranged from a minimum of 2 to a maximum of 5. (See column 4 of Table II.)

To be sure, most of these candidates were running for positions which are elected in less than statewide areas. For statewide offices, minor party candidates have not done well since 1977. (See J.A. 79.) For offices which are not statewide, such as for Congress, the State legislature, and positions in local governments, the minor parties seem to have no difficulties in reaching the general.

What accounts for this difference we can only surmise. It would not be unreasonable to expect the strength of minor parties to be locally based. One might expect, for example, that the Socialist Workers Party would find broader appeal in the metropolitan Seattle area than in the farm communities of Eastern Washington. And, in fact, the Seattle area is where the party concentrated its limited efforts in 1983. (See J.A. 30-58).

But whatever the reason for the difference, the success of minor party candidates in these non-statewide primary elections surely suggests that a lack of diligence and a lack of an appealing message is the real root of the problem in statewide races. And in any event, there is simply no rational basis for the result reached by the court below, viz., the creation of a two-tiered system for local and statewide elections under which the 1% requirement is applicable to local races, but not to statewide races. If minor parties tend to focus their efforts on local, rather than statewide races, as seems to be the case, that certainly provides no constitutionally compelling reason for invalidating the 1% requirement for statewide races.

CONCLUSION

For the reasons given above, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1985

SECRETARY OF STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Appellant,

v.

SOCIALIST WORKERS PARTY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLEES

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QUESTIONS PRESENTED

1. Whether the evidence supports the Court of Appeals' finding that Washington's political history evidences no voter confusion, ballot overcrowding, or other impairment of the integrity of the electoral process resulting from minor party participation, under the preexisting reasonable ballot access limitations.

2. Whether the new stricter restrictions on ballot access, which have "substantially barred minor party candidates for statewide offices from the ballot" since their enactment, impact fundamental First and Fourteenth Amendment rights to vote and associate for the advancement of political ideas.

3. When the State of Washington had an effectively functioning nominating signature requirement for ballot access in place for many decades, did the Court of Appeals correctly hold that the imposition of new stricter restrictions, that kept almost all minor parties off the statewide general election ballot, must be justified by evidence of some real and substantial harm or danger requiring the new restrictions.

4. Whether the Court of Appeals correctly held that, on the record before it, the state had failed to present evidence to establish any substantial threat of harm requiring the imposition of the new uniquely restrictive scheme which, as applied, effectively barred minor parties from the general election ballot in statewide elections, such as this one for U.S. Senate.

5. Whether the effect of Washington's ballot access limitations, as applied in this case--to reduce the number of parties on the ballot for U.S. Senator from three to two--was more restrictive than necessary to protect the State's interest in preventing a cluttered ballot, voter confusion, and to protect the integrity of the election process from frivolous or fraudulent candidacies.

6. Whether *Anderson v. Celebrezze*'s prohibition of the discriminatory effect on minor party and independent candidates of a relatively early filing deadline applies to elections for the U.S. Senate as well as to Presidential elections.

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TABLE OF AUTHORITIES

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Constitution[1]

[1]The text of each provision is set forth in Appendix A. to this Brief.

Statutes: Washington Revised Code (hereafter RCW)

Other Authorities

STATEMENT OF THE CASE

1. Nature Of The Case.

This is an action for declaratory and injunctive relief. Plaintiffs are a minor party, one of its candidates, and voters, who asked the court to declare unconstitutional, as applied, certain election laws of the State of Washington adopted in 1977, principally RCW 29.18.110[2] (*See* Appendix A.) These amendments, since their adoption, have in their effect substantially excluded minor parties from participating in general elections for state-wide offices in the State of Washington. The specific election at issue below has now passed. However, this case is not moot. *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

2. Opinion Below.

The Court of Appeals, at 765 F. 2d 1417 (1985), found the challenged electoral scheme unconstitutional, as applied to statewide electoral contests.

3. Facts Relevant to the Issues Presented for Review.

(a) Plaintiffs

Plaintiff-Appellee Socoalist Workers Party (SWP) is a serious, legal, political party with a long history of social and political activism in the United States, including the State of Washington.

The SWP is clearly not a frivolous or fraudulent party.[3] The SWP has been a nationally organized, serious political party for over forty years. Its candidates have regularly participated in local and national elections in the majority of states in the union. This has required the collection of hundreds of thousands of nominating petition signatures, to obtain ballot placement in the various states. JA 54. Its candidates for national and local office have regularly part-

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[2]The 1977 Amendments to RCW 29.18.020, .110, 29.24.020 and 29.30.100 together move the qualification deadline ahead two months for minor parties, put their nominee on the primary rather than the general election ballot, and bar the nominee from the general election ballot unless 1% of the primary votes are cast for the minor party nominee.

icipated in elections in the State of Washington, and have regularly achieved ballot placement, by nominating petition signatures, prior to the 1977 amendments at issue here.[4] The party's campaigns are conducted by earnest and experienced political activists. They espouse a serious political program and address important issues pertaining to foreign policy, economics, social equality, and government. Affidavit of Hickler, JA 28, *ff.*

Plaintiff Dean Peoples was the lawfully nominated candidate of the Socialist Workers Party for the 1983 Special Senatorial Election. He was nominated by the convention held in September, 1983, in compliance with the procedure established by R.C.W. 29.24, and his nomination was duly certified by the Secretary of State. Because of the 1977 amendments, his name was placed on the primary ballot instead of the general election ballot.[5] Thus instead of increasing the choices in the general election from two to three, The SWP's nominee was thrown in with the eighteen Democrats and fourteen Republicans whose

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[3]The legislative history of the 1977 amendments, though sparse, does contain a definition of a "frivolous minor party" for the purpose of this legislation:

> Mr. Deccio: Representative Nelson, you use the term "frivolous minor parties". Would you give us an example of what a frivolous minor party is?
>
> Mr. Nelson (Dick): Well, I think, to give you a general definition, I think a frivolous minor party is a party that really doesn't have a platform and isn't seriously proposing solutions to the problems of the State and this nation.

1977 House Journal, Vol I, p. 696.

[4]In the 1976 General Election for U.S. Senate, the SWP candidate received over 7,400 votes. J.A. 137. Since then, under the restrictions imposed by the new legislation restricting it to the primary, the SWP vote count has plummeted. JA 79.

[5]Compare [new] RCW 29.18.020 with former 29.30.100. Appendix A.

names were placed on the primary ballot to contend for their parties' nominations, who were on the same ballot simply as a result of their individual declarations of candidacy.[6]

(b) The Election.

The 1983 race for the Republican nomination for U.S. Senate was hotly contested between Dan Evans and Lloyd Cooney. Likewise, the race for the Democratic nomination was hotly contested between Mike Lowry and Charles Royer. As a result, these top four candidates together got approximately 98% of the vote in the primary election, the other two percent being divided among the remaining twenty-nine candidates. None of these other candidates, including Plaintiff Dean Peoples, got anywhere near 1% of the primary votes. JA 136. The primary contest for the party nominations thus resulted in Dan Evans being selected as the Republican candidate, Mike Lowry being selected as the Democratic candidate, and Dean Peoples, the candidate already lawfully selected by the nominating convention as the candidate of the Socialist Workers Party, being barred from the general election ballot because of his failure to poll the approximately 7,000 primary votes he would have needed to meet the new requirements of RCW 29.18.110. The effect of this new restriction was simply that the general election ballot thus carried the names of the nominees of two parties rather than three. Voters were given no alternative to the Democratic and Republican parties, as a direct result of the statute under challenge in this case, even though over 36 percent of the voters in the primary had voted against the two nominees who reached the general election ballot, and over half the registered voters had not even participated in the primary. Affidavit of Whiting. JA. 80.

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[6]RCW 29.18.030.

(c) History of the Statute Under Challenge.

Prior Law.

Prior to Chapter 209, Laws of 1907, which provided for primaries, all candidates for election in the general elections in the State of Washington were nominated by party conventions. Opinions of the Washington Attorney General 1935-1936, p. 40. The new 1907 primary election laws restricted participation in primary elections to political parties whose candidates received 10% of the votes cast at the preceding general election. Section 5183, 5203, Rem. Rev.Stat. New and minor parties continued to nominate by convention. Starting in 1925, convention nominating petitions required the signatures of at least twenty-five registered voters. Laws of 1937, Ch. 97 § 2.

By the time of the 1977 amendments, minor party nominating conventions required the attendance of at least one hundred registered voters, whose signatures and addresses were required to be affixed to the nominating petition. RCW 29.24.030, .040. The 1977 amendments increased the number of signatures required for a valid nominating petition, to one-hundredth of one percent of the registered voters, now amounting to just under two hundred signatures. AB. 5. Appellees do not challenge the nominating signature requirement of the 1977 statute, since such requirements have always kept the number of candidates to a small number, while allowing ballot access to most minor party candidates who made a serious or reasonably diligent effort to qualify.

From its inception, the State of Washington successfully held elections pursuant to this scheme. Minor parties regularly participated in statewide elections. *See* Appendix A, to the Complaint, JA 25. The record indicates that in only one year, 1952, was there no minor party candidate for Governor, historically the race with the most minor party participation. In the other twenty elections the number of minor party candidates varied between a minimum of one and a maximum of six. The mathematical average was 2.75

minor party candidates participating per election.[7] The number of nominees for other statewide offices has been substantially less than the number for Governor. For U.S. Senate, for example, there were 3 minor party nominees in 1976, four in 1974, and never more than two before (or since). There have never been more than four minor party candidates on the ballot for any other office covered by this law. J.S.:A-6. (The evidence is contrary to the Defendant's misleading statement at AB 8, without citation to the record, implying that 12 parties were competing for offices affected by this contested law.) The following table summarizes the recent history of minor party nominations for major statewide offices.

Table I

MINOR PARTY CANDIDATES

	U.S. Senate		
		Nominated	On Election Ballot
old law	1952	2	2
	1956	0	0
	1958	0	0
	1962	2	2
	1964	0	0
	1968	2	2
	1970	2	2
	1974	4	4
	1976	3	3
new law	1980	2	0
	1982	1	0
	1983	1	0

[7]And, as noted by the Court of Appeals, the number of candidates declined: in the first 10 elections of the century the average total number of candidates was 5.3; in the last 10 elections, only 4.2. J.S.:A-6

Table I Continued

		State Governor	
old law	1952	0	0
	1956	1	1
	1960	2	2
	1964	1	1
	1968	2	2
	1972	3	3
	1976	6	6
new law	1980	1	0
	1984	2	0

Notes: For each other statewide office (Lieutenant Governor; Secretary of State; Attorney General; State Auditor; State Treasurer; Land Commissioner; Insurance Commissioner), there have been substantially fewer minor party candidates, usually none, occasionally one, rarely two, with only one exception: Lt. Gov. had 4 minor party nominees in 1976. In total 15 of 15 qualified for 49 races 1952-1976. Only one qualified for the 14 races in 1980 and 1984. State of Washington, Abstract of votes.

Cf. Williams v. Rhodes, 393 U.S. 23, 47 (1968) (Harlan, J., concurring) ("[T]he presence of eight candidates cannot be said, in light of experience, to carry a significant danger of voter confusion.")

There is no evidence that in this entire history of elections under pre-existing law, there was ever a problem with a "cluttered ballot," "voter confusion," or any impairment of the "integrity of the election process," by "frivolous or fraudulent candidacies."

New Restrictions.

In 1977, the Washington legislature revised the election procedures for minor parties, with the purpose and effect of adding a substantial new barrier to minor party ballot access.

Previously, the partisan primary[8] had been conducted only to select major party nominees for the ballot, as an alternative to the previous convention method of nominating candidates for the election ballot. The 1977 legislature repealed RCW 29.30.100, which put minor party convention nominees directly on the general election ballot, the same as major party primary nominees. The amendment to RCW 29.24.020 moved the time for minor party candidate selection from September up to July: from the time of the major party primary up to a date before the major party prospective nominees have even begun to declare their candidacies.

The 1977 amendments also required the name of the single nominee of the minor party to be placed on the primary ballot, along with the names of all the multiple aspirants for the nomination of each of the two major parties, whose names appear on the ballot as a result of their simple declaration of candidacy. RCW 29.18.030. RCW 29.18.110 *See* Appendix A.

The following chart illustrates the changes in timing which now impose a relatively early deadline on the minor parties, compared to the previous scheme which made the major and minor party nomination dates simultaneous.

[8]"The purpose of a primary election is to narrow the field of candidates to one per party in order that the general election might be reserved for major struggles, not intra-party feuds." *Cross v. Fong Eu*, 430 F.Supp. 1036, 1038 n.2 (N.D.Calif. 1977), citing *Storer v. Brown*, 415 U.S. 724, 735, (1974).

TABLE II
TIME LINE

	Prior Law		New Law	
	Major Party	Minor Party	Major Party	Minor Party
July	Candidates Declare for Nomination: week starting last Monday in July.		Same as prior law	Nominee Selected & qualified by convention--petition'; Saturday prior to major party primary filings; nominee placed on primary ballot instead of general election
Aug.				
Sept.	Selection of Nominee: Primary Election on 3d Tuesday	Minor Party Convention to Select Nominee; petition signature requirement for ballot placement	Same as prior law	Minor Party Nominee disqualified if primary votes under 1%.
Oct.				
Nov.	Nominees run in election: 1st Tues. in November.	Nominee runs v. other nominees.	Same	

Voters now must choose between participation in the major party primary candidate selection process, or instead casting their primary election vote for the single minor party nominee who has already been selected at the nominating convention. Unless the minor party candidate receives votes of more than one percent of the total number of votes cast in the primary, the minor party is excluded from the November general election ballot. No explanation of this requirement appears on the primary ballot. While there is nothing inherently impossible about the one percent primary vote requirement, it is the actual effect of this barrier that must be examined. And, in practice, the barrier has proved nearly insurmountable.

(d) Effect of Statute on Minor Parties.

In each election held during the almost seven year period since the law was amended, at least one, but not more than several, minor party candidates have attempted to win a position on the general election ballot. The 1977 amendments, as applied, resulted in the total exclusion of all minor party nominees[9] from participation in the general election process for statewide offices from the time the amendments were adopted, until the time this suit was filed. The state supplemented the record on the day of oral argument before the Ninth Circuit, indicating that of the four subsequent candidates, one--the Libertarian nominee for State Treasurer--had gotten just over the 1% barrier. The Circuit Court did not find this one exception, in a relatively low interest race, to be sufficient to establish the general reasonableness of the barrier.[10] J.S.:A-4

[9]Three "independent" candidates, well known political figures who apparently felt they were unlikely to get the Republican or Democratic nominations, have qualified for the ballot under the new scheme. Their ability to meet the 1% requirement does not indicate that the barriers are reasonable as applied to minor parties. *See* Argument below. (One, John Miller, was previously president of the Seattle City Council and is now a Republican member of the United States Congress. Jesse Chiang was a previous contender for the Republican Party nomination. King Lysen was a prominent Democratic Party member of the State Legislature.) See J.A. 135, 136.

[10]There is no evidence shows that all the excluded nominees were less diligent than the nominee for treasurer. And total exclusion is not required to show a substantial impact on protected interests. *See, e.g. SWP v. Secretary*, 412 Mich. 571, 317 N.W.2d 1, 9 (1982) (3 out of 4 minor parties qualified in 1980, none of 3 in 1978). *Anderson, infra* at n.12 (5 minor parties qualified).

Washington law also apparently excludes persons who have participated in the primary election, as minor party candidates are now required to do, from having even write-in votes counted in the general election. R.C.W. 29.51.170[11]

Had minor party nominees not been excluded in this way in the eight years *since* the new restrictions, there still would have been no race with more than two minor party candidates on the general election ballot.

However, as a result of the new restrictions, voters at the general election whose political preferences lie outside the existing political parties have been deprived of a minor party alternative to the major party candidates for statewide office.

SUMMARY OF ARGUMENT

The discriminatory purpose and invidious effect of the additional restrictions imposed upon minor party access to the ballot in 1977 was to remove the minor parties from the central arena of political debate--the general elections--and restrict them to the pre-election candidate selection process--the primary elections--in which numerous major party candidates are competing to become the nominee of their party.

If the State of Washington had just retained its straightforward nominating petition signature requirements for minor party ballot access, like other states have, this case would not be here.

The State of Washington has been conducting elections with minor party participation under its old nominating

[11]"*Provided*, That no write-in vote for a partisan office at a general election shall be valid for any person who has offered himself as a candidate for such position for the nomination at the preceding primary." *And see* Affidavit of Donald Whiting, Supervisor of Elections, at pp.2-3, JA 135, indicating no write-in votes recorded in list of election results, which is limited to candidates on the ballot. The assertions of counsel for Appellant of an interpretation of the statute which would relieve minor party candidates of its exclusionary effect is not supported by any evidence. (Even if it were, this would not save an otherwise unconstitutional ballot access restriction. *See* Argument, below, *Anderson*, 460 U.S. at 799 n.26.)

signature requirements since the turn of the century with no evidence of ballot crowding, voter confusion, or impairment of the integrity of the election process.

On the contrary, minor parties play a vital role in our electoral process--as a fertile source of new ideas, as a source of diversity and challenge to the status quo--and they have significantly influenced the major parties on issues from abolition to civil rights, from women's suffrage to the Vietnam war. The legitimacy and stability of our political system is enhanced when the electoral forum is open and not monopolozied by the two major parties. Though our winner-take-all electoral system makes large vote totals for minor parties very unlikely, the essential role[12] of minor party participation in the electoral process has been universally acknowledged. *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 188 (1979).

Now the State of Washington has effectively terminated minor party participation in the races most significant to the press and the populace: the statewide races such as U.S. Senator and State Governor. The new 1977 ballot access restrictions inappropriately handicap the minor parties with requirements that have proved virtually impossible to meet, as applied in practice. The SWP nominee Plaintiff Dean Peoples was unable to get on the ballot in this case. As far as the record reflects, no minor party senatorial candidate has *ever* been able to meet these requirements. And there is no evidence that the preexisting nominating convention petition signature requirements have not adequately limited minor party participation: to an average of about two minor party nominees per race--with a historical maximum of 4, in the U.S. Senate elections.

The new election law has effectively barred these minor party nominees from the ballot by relegating them to the

[12]In fact, allegations of restrictions on minor party ballot access in Nicaragua have been asserted as demonstrating the end of democracy in that country.

primary election. The September primary is not, strictly speaking, an election, because in it *no one can be elected.* It is merely a nominating process. Even if only one candidate should declare for the office, and thus get 100% of the primary votes cast in September, the result is not *election*, but rather simply earning one party's *nomination* for the race on the election ballot in November. In other words:

> The purpose of a primary election is to narrow the field of candidates to one per party in order that the general election might be reserved for major struggles, not intra-party feuds.

Cross v. Fong Eu, *Supra*, n.8.

As a result, it is only natural that the primary election attracts a relatively small number of voters--primarily the major party adherents who are most concerned about who the party nominees will be. Even though the "blanket" primary is designed to attract broader participation in the primary, experience suggests that "cross-over" voting is minimal, *Heavey v. Chapman*, 93 Wn. 2d. 700, 611 P.2d 1256, 1259 (1980) (Horowitz, J., concurring), and in Washington only about 38% of the registered voters participate in the primary, on average. JA 80.

Thus, minor party "campaigning" is relegated to the relatively early period before major party nominees are selected, a time when "volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign." *Anderson*, 460 U.S. at 792.

Major party candidates can get on the primary ballot simply by declaring, rather than having to meet the same convention requirements imposed on minor parties. As a result the primary ballot *is* crowded: 33 contending Democrats and Republicans in the primary in our case. This delays the possibility of any effective debate on the major issues until after the field of candidates has been limited to one per party. Candidates forums, community

meetings, and the like would be impossible until after the primary with such a crowd of candidates.[13]

Once the primary was over, and voters dissatisfied with the choices within the two major parties might have been attracted by the campaign of a minor party alternative, it was too late. The field had been narrowed from three candidates to two, and the election campaign itself was limited to Democrats versus Republicans. The two major parties were by then deprived of any motivation to consider the ideas of the third party candidate, to try to forge a broader coalition to win away minor party supporters.

All voters whose political preferences were outside the two major parties were left with the choice of voting for a candidate who was not responsive to their views, or to sit out the general election.

If the state is to justify a system which, in practice, has limited the significant campaign to the points of view of the two major parties, it must sustain the burden of proving some *need* to adopt such restrictive measures, beyond the theoretical permissibility of ballot access requirements in general. Against Washington's historical pattern of successful openness, the "draconian"[14] new changes require substantial evidence of some real and substantial problem to justify their imposition.

After carefully weighing the interests the state advanced, and correctly applying the tests acticulated by this Court in the leading cases, the Court of Appeals below correctly found that the state had failed to make any record that would fulfill its obligation to justify the new restrictions, and held they were invalid as applied to the plantiffs minor party, candidate, and interested voters, and others similarly situated.

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[13]It is revealing that while the State argues that the primary ballot appearance of minor party candidates is an adequate substitute for general election ballot access, AB 18, the benefits of a ballot of reasonable size, limited to serious candidates, are not extended to the minor parties in the primary process they are supposed to be satisfied with as their one chance to address the electorate.

[14]Characterization by the Court of Appeals, J.S. A-7.

Petition signature requirements have been upheld in the past as a legitimate *means*[15] to accomplish the important state goal of avoiding the confusion and expense of a ballot flooded with frivolous candidates. The State of Washington has such a signature requirement and the SWP complied with it. They were the only minor party to do so. The State has never contended that the Peoples candidacy was frivolous. Yet the new restrictions eliminated Peoples, the only alternative to the major parties, from the general election ballot. The issue remains whether the *addition* of the new restrictions to the continuing signature requirement was *necessary*.

The Appellant Secretary's Brief admits, as it must, the factual basis for our case: minor party nominees have been kept off the statewide general election ballot by the new restrictions. Its response is to argue that:

--Write-in votes are sufficient: this is legally and factually wrong. Write-in votes are not allowed and even if they were this would not be a constitutionally adequate substitute for ballot access. *Anderson*, 416 U.S. at 799 n.16.

--Higher percentages have been upheld in other cases. This Court has upheld a higher *petition* requirement. But there is no reason to believe that a 1% *vote* requirement is not much harder to achieve, as has been established by the record in this case, as compared to the record in other cases showing substantial and regular access to the ballot by minor parties, by petition alone.

--Access to the primary process means that elimination from the general election does not heavily burden minor party interests. This is without support in authority or in logic, due to the inherent limits on voter and media interest in the overcrowded primary process, and the very different purposes of the primary process compared to the general election.

[15]Such a requirement is not an end in itself. *Anderson*, 460 U.S. at 788 n. 19.

--Finally, even though the SWP and other similarly situated candidates for statewide office have been systematically excluded from the ballot, this fact can be obscured by a chart lumping local candidates together with statewide candidates. It is clear on the record, however, that the effect of the law is drastically different for the two categories. It is of no benefit to voters, or to candidates eliminated from the major, statewide races, that other candidates or parties may qualify for county commissioner, or other local office. Thus the only issue raised on the pleadings and decided by the courts below was the validity of the new restrictions as applied to this race for U.S. Senate, in view of the overall exclusionary effect on all minor party attempts to nominate candidates for the general election ballot for all statewide races.

As shown below, on the issue presented to it, the Court of Appeals was plainly right.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY IDENTIFIED AND APPLIED THE ANALYSIS ESTABLISHED BY THIS COURT.

A. Ballot Access Restrictions Impact Fundamental First Amendment Rights Of New And Small Political Parties, Their Members And Supporters, And Of Voters In General, To Vote And To Associate For The Advancement Of Political Beliefs.

This Court has summarized the constitutional rights implicated by ballot access restrictions as follows:

> Restrictions on access to the ballot burden two distinct and fundamental rights: "The right of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). The freedom to associate as a political party, a right we have recognized as fundamental ..., has diminished practical value if the party can be kept off the ballot. Access restrictions also implicate the right to vote because absent recourse to referendums, "voters can assert their preferences only through candidates or

parties or both." *Lubin v. Panish*, 415 U.S. 709, 716 (1974). By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences. And for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

When such vital individual rights are at stake, a state must establish that its classification is necessary to serve a compelling interest. *American Party of Texas v. White*, 415 U.S. 767, 780-81 (1974).

...[And] "even when pursuing a legitimate interest, a state may not choose means that unnecessarily restrict constitutionally protected liberty," *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973), and we have required that states adopt the least drastic means to achieve their ends. *Lubin v. Panish, supra*, 415 U.S. at 716; *Williams v. Rhodes, supra*, 393 U.S. 31-33. This requirement is particularly important where restrictions on access to the ballot are involved.The states' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation. Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as obtaining political office. *See* A. Bickel, *Reform and Continuity*, 79-80 (1971);W. Binkley, *American Political Parties*, 181-205 (1959); H. Penniman, *Seit's American Political Parties and Elections*, 223-239 (5th Ed. 1952). Overbroad restrictions on ballot access jeopardize this form of political expression.

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 184-186 (1979).

The Court of Appeals rendered its decision in this case based explicitly on the guiding principles summarized in the latest of the series of major cases analyzing the legitimacy of state restrictions on minor party ballot access, *Anderson v. Celebrezze*, 460 U.S. 780 (1983). There this Court rejected the idea of a "litmus-paper test" that would separate valid from invalid restrictions, and described the following analytical process, adopted by the court below:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Decision of the Court of Appeals, JS A-2, 3.

B. "Minor Party" Participation In The Electoral Process Is Essential To The Health And Vitality Of The Marketplace Of Ideas And Our Republican Form Of Government.

As noted above, ballot access restrictions operate in an area of the most fundamental First Amendment activities. If the only purpose of the electoral process were the selection of an office holder for the prescribed period, then the elimination of minor party candidates from the ballot would do no harm, as they are unlikely to actually get elected. But such a conception would be totally mistaken, in light of the established principle that "an election campaign is a means of disseminating ideas as well as attaining political office." *Ill. State Bd. of Elections v. SWP, supra*, at 186.

Political association, political expression, and voting are integral to the operation of the republican system of government established by our Constitution. The First Amendment affords the broadest protection to such political activities in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Governmental "action which may have the effect of curtailing" such fundamental freedoms "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 460-461 (1958).

> By limiting the opportunites of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two

major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream. *Illinois Elections Bd. v. Socialist Workers Party*, *supra*, 440 U.S., at 186; *Sweezy v. New Hampshire*, 354 U.S. 234, 250-251 (1957) (opinion of Warren, C.J.).[17] [[17]*See generally*, V.O. Key, *Politics Parties, and Pressure Groups* 278-303 (3d Ed. 1952). As Professor Bickel has observed,

> "Again and again, minor parties have led from a flank, while the major parties still followed opinion down the middle. In time, the middle has moved, and one of the major parties or both occupy the ground reconnoitered by the major party;....[A]s an outlet for frustration, often as a creative force and a sort of conscience, as an ideological governor to keep major parties from speeding off into an abyss of mindlessness, and even just as a technique for strengthening a group's bargaining position for the future, the minor party would have to be invented if it did not come into existence regularly enough."

A. Bickel, *supra* n. 11, at 79-80.]

In short, the primary values protected by the First Amendments--"a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)--are served when election campaigns are not monopolized by the existing parties.

Anderson v. Celebrezze, 460 U.S. at 794 (1983).

In a republican form of government, political power is excercised by minority groups not only by *electing* a candidate of the group, but also in participating in the political process in other ways, such as forming electoral coalitions to campaign for common goals, and affecting the platforms of other parties who seek to gain their collective support, or to win their voters away from them. The theory of representative government is that shifting coalitions will modify and redefine their positions so as to appeal to new constituents and maximize their political strength.[16]

[16]*See*, J.S. Mill, Considerations on Representative Government 146 (1st Ed. London 1861) ("It is an essential part of democracy that minorities should be adequately represented.") See also, Note, Section 5 of the Voting Rights Act, 94 Yale L.J. 139, 142 (1984).

If minor parties can be excluded from the general election ballot, the major parties are insulated from any possibility that the results may be affected by these organized groups of voters, and thus have no motive to aim their appeals, or act in office, in such a manner as to represent the interests of minor party voters.

When insular minorities are the target of exclusion from political participation, this decreases the stability and legitimacy of our political system.[17]

C. The New Ballot Access Requirements In The Present Case Directly And Substantially Impair The Fundamental Rights Identified By This Court, Making Appropriate Heightened Judicial Scrutiny.

1. The Rights At Stake Are Those Traditionally Strictly Protected.

The State's claim (AB at 17-19) that Washington's new ballot access restrictions do not impact the fundamental rights identified by this Court and outlined above is both factually and legally wrong. Rather, as is shown in detail in Arguments §§ II,III, and IV below, the new restrictions, as applied to statewide elections, have tremendous adverse impact on precisely the "full debate" and "prevention of monopoly" interests the State admits (AB at 16) are crucial to the analysis in this case. Given this substantial impact on these rights, the Court of Appeals' analysis and conclusion was clearly right under this Court's precedents.

The rights at stake in this case trigger all three of the tests for heightened judicial scrutiny catalogued in the now-famous footnote in *United States v. Carolene Products Company*, 304 U.S. 144, 152-153 n.4 (1938), cited in *Anderson* at 460 U.S. 793, n.16.

Discussing the exceptions to the mere "rationality" test based on a "presumption of constitutionality," the first paragraph of the footnote refers to the exception which

[17]*Compare:* Voting Rights Act of 1965, 42 U.S.C. §1971 et ff. The effect of the new restrictions on minor parties has been a classic "retrogression" of minority voting power, which should be countenanced for only the most compelling reasons.

arises in the event of a conflict with the fundamental rights embodied in the Constitution and the Bill of Rights, "which are deemed equally specific when held to be embraced within the Fourteenth." The second paragraph "suggests that it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of polical participation and communication are kept open." Ely, *Democracy and Distrust* at 76 (1980). And the third paragraph focuses on the review of statutes which reflect a "prejudice against discrete and insular minorities" "which tends to seriously curtail the operation of those political processes ordinarily to be relied upon...and which may call for a correspondingly more searching judicial inquiry." *Carolene, id.*

Though the text of the First Amendment does not explicitly mention freedom of association, it is now beyond argument that the First Amendment guarantees of speech, press, assembly, and petition require the recognition of a fundamental First Amendment freedom of association. In *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 460 (1958), the Court explained:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association....It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech....

The second concern discussed in *Carolene Products, supra*-free access to the political process--is also at the heart of the First Amendment. Associational activity in the political process falls within the core of the values protected.[18] Thus in *Williams v. Rhodes*, 393 U.S. 23 (1968), this Court invalidated ballot access burdens that impacted the right of political association by keeping minor parties off the ballot, thereby frustrating the effectiveness of their association. *Id.* at 30-31. In *Kusper v. Pontikes*, 414 U.S. 51 (1973), the Court reiterated that "there can no longer be any doubt that freedom to associate with others for the common

[18]*See*, e.g. *Brown v. Hartlage*, 456 U.S. 45, 53 (1982), and cases there cited.

advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments."

The Constitution does not protect these rights only against total denial, but also from any "significant interference." *Bates v. Little Rock*, 361 U.S. 516, 523 (1960). "Freedoms such as these are protected not only against heavy handed frontal attack, but also from being stifled by more subtle governmental interference." id. at 523. Thus, contrary to the State's assertion (AB 15) that only a "virtual bar" of minor party access can be seen as having any impact on the rights at stake, any substantial burden on these rights is carefully scrutinized.[19]

Closely related to the fundamental right to political association is the right to vote, and "undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554, (1964). "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Id.* at 555.

Consequently, restrictions on candidacy have been struck down as violative of the "right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

When the choice of parties and candidates on an election ballot has been reduced to two, this leaves an identifiable political group of dissenters with no opportunity to express their strongly held political opposition to the two candidates of the Democratic and Republican parties, effectively abridging their right to cast a vote expressive of their political beliefs. When unnecessary restrictions on the field of candidates thus limits the voter's freedom of choice, the effectiveness of a right to vote is substantially

[19]As applied to the statewide offices at issue in this case, the record shows this is a virtual bar.

impaired. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). In addition, it must be remembered that candidate Peoples was not merely running for an office in state government but was a candidate for the United States Senate. It has long been recognized that elections for federal office require a higher degree of scrutiny than candidates for local office. *Compare Kirkpatrick v. Preisler*, 394. U.S. 526, 532 (1969) (strict scrutiny) *with Mahan v. Howell*, 410 U.S. 315 (1973). *See also Oregon v. Mitchell*, 400 U.S. 112 (1970).

The third prong of the *Carolene Products* footnote, the concern for the interests of "discrete and insular minorities" is most clearly at stake here, and was addressed explicitly in *Anderson*, 460 U.S. at 793 n. 16. The invidious discrimination inherent in this statutory scheme will be discussed in more detail in Arguments IID and IIID, below.

2. **Both Equal Protection Analysis And First Amendment Analysis Require Careful Scrutiny Of The Impact, Breadth And Justification Of The Resrtictions.**

Traditonal equal protection analysis, as this Court employed in *Williams v. Rhodes*, 393 U.S. 23 (1968), requires strict scrutiny given the impact on fundamental rights apparent in this case. The Equal Protection Clause requires that classifications impacting on personal liberties be drawn narrowly and in conformance with the state purposes they are intended to serve. Legislative distinctions in protected areas must be carefully "'tailored' to achieve the articulated state goal". *Dunn v. Blumstein*, 405 U.S. 330, 357 (1972).

Thus, a legal classification may fail to meet constitutionally required standards in two different ways: the state may fail to introduce adequate evidence to establish that the interest that requires the statute is "compelling," or, alternatively, the state may adopt a means which fails to closely fit the boundaries of the compelling need addressed. The poor fit may be "under-inclusive" by failing to include all persons or things "tainted with the mischief" it is

aimed at; or it may be "over-inclusive" by placing a "burden on a wider range of individuals than...those tainted with the mischief at which the law aims." Tussman & Ten Broek, "The Equal Protection of the Laws," 37 Calif. L. Rev. 341, 344 (1949).

The overbroad law is invalid because it imposes a penalty without a purpose, on individuals placed with a disadvantaged class who are "so different from others of the class as to be without the reason for the prohibitions." *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938). Such overbreadth is fatal to a statute which restricts First Amendment activity. *E.g. United States v. Robel*, 389 U.S. 258, 266 (1967) (presumption of danger invalid as applied to appellant.). (Similarly, Appellees here are neither frivolous, nor would a third candidacy be confusing or disruptive). The under-inclusive law is equally suspect. The failure to include all members of the class which threatens the harm "belies" the purported justification. *See SWP v. Secretary of State*, *supra*, 317 N.W.2d at 9; *Goesaert v. Cleary*, 335 U.S. 464, 468 (1948) Rutledge, J., dissenting); *Railway Express Agency v. New York*, 336 U.S. 106, 112-113 (1949) Jackson, J., concurring).

Some laws manage to violate all three of these constraints: the threatened harm is not demonstrated to be compelling by evidence on the record, when the remedy imposed is "under-inclusive", and also "over-inclusive" at the same time--placing in the disadvantaged class some persons or activities that do not belong there, and omitting from that class others which do. Such statutes may arguably fail to pass even the more forgiving "rationality" test, let alone the required strict scrutiny. *See SWP v. Secretary of State*, 412 Mich. 571, 317 N.W.2d 1, 9 (1982); *Kramer v. Union Free School District*, 395 U.S. 621 (1969) (both over-inclusive and under-inclusive). And even if arguably "rational," such laws clearly fail any variety of heightened scrutiny. *See generally*, Gunther, "A Model for a Newer Equal Protection," 86 Harv. L. Rev. 1 (1972).

Another approach was taken in *Anderson*, where this Court chose not to engage in the traditional equal protect-

ion analysis, but rather went directly to the "Fundamental rights" protected by the First and Fourteenth Amendments and implicated by electoral restrictions. 460 U.S. 780, at n.7. This approach is consistent with the Court's handling of earlier cases. *See Williams v. Rhodes*, 393 U.S. 23 (1968), at 30, 35-41 (Douglas, J., concurring), 41-48 (Harlan, J., concurring); *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973); *American Party of Texas v. White*, 415 U.S. 767 (1974) ("Whether the qualifications for ballot access are viewed as substantial burdens on the right to associate or as discriminations against [nonestablished] parties," they could be upheld only if necessary to further compelling state interests. id. at 780).

In either case, the "bite" of judicial review is the same: to decide whether, in aiming at even an established compelling state goal, the state went "beyond what was *necessary*." *Shelton v. Tucker*, 364 U.S. 479, 489 (1960); *see United States v. Robel*, 389 U.S. 258, 266 (the fatal defect of overbreadth"); *see generally*, Note, "The First Amendment Overbreadth Doctrine," 83 Harv. L. Rev. (1970). As is shown below and as held by the Court of Appeals, the State in this case cannot justify the ballot restrictions under any applicable analytical framework.

II. WASHINGTON LAWS ARE UNIQUELY RESTRICTIVE IN REQUIRING A PRIMARY VOTE PERCENTAGE IN ADDITION TO THE NOMINATING PETITION SIGNATURE REQUIREMENT.

The State bases its defense of the new Washington primary vote requirements on an inapt comparison to numbers of petition signatures required in other states. AB 19-20. In fact, as shown below, the two systems are not comparable, either in nature or in effect.

A. Requiring Primary Votes is Qualitatively More Restrictive Than Requiring Nominating Signatures.

This Court upheld Georgia's nominating signature requirement in *Jenness v. Fortson*, 403 U.S. 431 (1971), validating the signature requirement on the grounds that a requirement of a demonstration of a "modicum of support"

for a minor party's ballot placement was a legitimate means to accomplish the goal of keeping the ballot free of a confusing clutter of frivolous candidates. *Id.* at 442. The only such community support requirements ever upheld in practice have been *petition signature* requirements.

The Court pointed out that "Georgia's election laws, unlike Ohio's,[20] do not operate to freeze the political status quo." The reasons included the following:

> Georgia imposes no suffocating restrictions whatever upon the free circulation of nominating petitions. A voter may sign a petition even though he has signed others, and a voter who has signed the petition of a nonparty candidate is free thereafter to participate in a party primary. The signer of a petition is not required to state that he intends to vote for that candidate at the election. A person who has previously voted in a party primary is fully eligible to sign a petition, and so, on the other hand, is a person who was not even registered at the time of the previous election. No signature on a nominating petition need be notarized.

Jeness, supra. Another significant factor was the six month period allowed for collecting the signatures. The Court then went on to rely on the history of success of third party and independent candidates under Georgia election law as its basis for affirming the constitutionality of the law as applied in practice. The Court of Appeals in the present case correctly found the primary vote requirement in this case different, JS at A-1,8, and more restrictive, as applied, than the petition requirements upheld in the past.

Footnote 10 in *Williams v. Rhodes*, 393 U.S. 23, 47 (1968) (Harlan, J., concurring) surveyed each state of the Union's requirements for ballot access for third party candidates. Apparently no state had a requirement of *votes*, as opposed to, or in addition to, *signatures*. The states surveyed had signature requirements as follows:

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[20]The subject of *Williams v. Rhodes, supra.*

Signatures required as a percentage of electorate	Number of states
De minimis to 0.1%	16
0.1% to 1%	26
1.1% to 3%	3
3.1% to 5%	4

Thus, 42 out of the 50 states had *signature* requirements of 1% or less of these voters. State ballot access restrictions were more recently surveyed in "Developments--Election Law," 88 *Harv. L. Rev.* 1111 (1975), where the authors, in 1975, again found no state requiring independents or minor parties to get a percentage of the *vote* in the primary to gain ballot access for the general election.

B. The Only Other Appellate Court Which Has Ever Evaluated The Actual Effects Of The Application Of A Similar Statute--A Primary Vote In Addition To Petition Signature Restriction On Ballot Access--Struck It Down As Irrational And Unnecessary.

Only one appellate decision evaluates the actual effect of a primary vote requirement, as opposed to a straight petition signature requirement, for minor political party ballot access. This is the challenge to apparently the only statutory scheme similar in this regard to the Washington State scheme, the 1976 Michigan requirement that a minor political party get 3/10 of 1% of the primary vote (as compared to the 1% Washington requirement) to get on the general election ballot. A three-judge federal court initially rejected a *facial* challenge to the statute by a 2-1 vote. *Hudler v. Austin*, 419 F.Supp. 1002 (E.D. Mich. 1976). The court did describe the Michigan requirement as unique in the U.S., *id.* at 1012, but refused to declare the statute unconstitutional "in advance" without evidence of its effects, as applied: "What works or doesn't work will always be a hindsight conclusion," *id.*, at 1015-1016. This court summarily affirmed the rejection of the challenge to the statute on its face. *Allen v. Austin*, 430 U.S. 924 (1977).

After the actual impact of this statute could be evaluated as applied in practice, the Supreme Court of Michigan struck it down as unconstitutional, following the guidance

provided by this Court:

> Ballot access implicates two distinct fundamental rights: the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)...Restrictions on access burden these fundamental rights directly. A political party denied access to the ballot is not an effective device for advancing the ideas or political aspirations of its adherents. As a result, access restrictions operate to deter membership and participation in the excluded political association. Voters, faced with statutorily limited ballot choices, may find excercise of the right to vote a Hobson's choice and not an expression of politcal preference, the bedrock of self-governance. This effect is heightened where, as here, restrictions on access work to eliminate political and ideological alternatives at the time major party candidates are selected, and before campaigning had identified and sharpened the issues facing the electorate.

SWP v. Secretary of State, 412 Mich. 571, 717 NW 2d 1, 6 (1982).

The Michigan court rejected the state's claimed justification of avoiding clogging the election machinery, reasoning as follows:

> Yet, the act operated to eliminate plaintiff political party from the 1980 general election ballot before the nine-party capacity of the voting machines was reached. [Three out of the four "new" parties qualified for the general election ballot. One, the Socialist Workers Party, did not.] Such premature elimination is inconsistent with the claimed legislative judgment about when the evils sought to be prevented should be addressed. It follows immediately that the act, as it has been applied, does not use the least drastic means to avoid unreasonable burdens on plaintiffs' constitutionally protected liberty.
>
> Nor it is plausible to argue that the additional restriction on access is *necessary* to further the interests claimed. The primary vote requirement is tied to ballot success (3/10 of 1% of the primary votes cast) and not to the machines whose capacity it is claimed prevents voter confusion and the clogging of the state's election machinery. As a result, the act does not rule out the possibility of *more* than nine parties qualifying for the general election ballot. Although the likelihood of such an event is remote, given the apparent stability of the major polit-

ical parties, a political climate conducive to splintering the electorate could well bring in its train the very evils the act was allegedly designed to avoid but is powerless to prevent.

...

[We] find that elimination of "new" political parties from the general election ballot before the evils sought to be addressed actually arise, violated the requirement that plaintiffs' constitutionally protected liberty be burdened in the least drastic way. By operation of 1976 P.A. 94, plaintiff Socialist Workers Party did not appear on the general election ballet in 1980. We hold that plaintiffs Socialist Workers Party and party member Walden were thereby denied their right to associate in violation of the First and Fourteenth Amendments. We hold further that the right to vote of plaintiffs Lafferty, Moore and Reed was also impermissibly impaired in violation of the First and Fourteenth Amendments.

Id., at 8-9.

This analysis applies equally to Washington's version of the "double requirement" of petition signatures plus primary votes, and likewise requires the invalidation of Washington's requirement--with triple Michigan's vote percentage, and with its proportionately more drastic effects.

C. Similar State Additions To The Petition Signature Requirement For Ballot Placement Have Likewise Been Found Unconstitutional.

In addition to Michigan, other courts have considered and struck down similar added provisos attached to petition requirements. For example, the Sixth Circuit Court of Appeals affirmed a district court's order striking down the Kentucky election law requiring petition signers to declare that they "desire to vote" for the candidate in question, noting

> the Supreme Court has never approved a declaration similar to the Kentucky 'desire to vote provision.' In fact, part of the reason why the Supreme Court approved the Georgia election law in *Jenness* was because that law *did not* require petition signers to state that they intended to vote for the candidate in the general election.

Anderson v. Mills, 664 F.2d 600, 610 (6th Cir. 1981). Another federal district court struck down the North Carolina requirement that petition signers affiliate with the party whose candidate they were asking be placed on the ballot. *N.C. SWP v N.C. State Board*, 538 F.Supp. 864 (E.D.N.C. 1982).

The reasons behind the distinction between ballot access and ballot success were pointed out by another federal court, in ordering Gus Hall and Angela Davis placed on the Michigan ballot as the Presidential candidates of the Communist Party:

> Defendents assert that altough Hall conducted presidential campaigns in the past, he never received more than a few thousand votes in any given race. But *electablility in not an appropriate prerequisite for ballot access.* The real question is whether there is enough support for placing a given candidate on the ballot, not whether there is enough support for electing the candidate. A large segment of the public may be determined never to vote for Hall and Davis yet may wish to see them on the ballot and support their effort to get them put on the ballot. Another segment of the population may be attracted to Hall and Davis, may find their viewpoint appealing, and may even support their candidacy in various ways. Yet when the members of this sympathetic constituency finally enter the voting booth, they may decide to vote for candidates with a greater likelihood of success. Considering Hall and Davis's support in this sense--putting aside the question of their vote-getting ability--the court is bound to conclude that they have substantial community support.

Hall v. Austin, 495 F.Supp. 782, 790 n.12 (E.D. Mich. 1980). The court there pinpointed the precise defects in the Washington primary *vote* requirement, which instead of testing community support for ballot placement, applies the much different criterion of electoral success, in a political context in which substantial vote tallies are extremely unlikely. This results not only from the limitations of the primaries to which minor parties have been relegated, discussed in the next two sections of this brief, but also from the dominant positions of the Democratic and Republican parties in our two-party system:

Preferences are of course shaped by the available opportunities and the existing allocation of power. The phenomenon of "sour grapes" reflects the fact that in some circumstances people reject opportunities because they perceive them to be unavailable. Preferences adapt to the available options; they are not autonomous. [Citations omitted].

C. Sunstein, "Interest Groups in American Public Law," 38 Stan. L. Rev. 29,82 (1985).

D. The Relatively Early Qualification Deadline Discriminates Against Minor Parties.

The 1977 amendments changed the minor party qualification deadline from the date of the September primary to a new date in July, the Saturday of the week prior to the week in which major party candidates declare for the primary. R.C.W. 29.24.020. This put an additional substantial burden on minor parties, discriminating against them compared to major parties, which is identical in kind to the discrimination condemned in *Anderson v. Celebrezze*, *supra*. Even though it is quantitatively less extreme, there is no question that this is a substantial "burden that falls unequally on new or small political parties...[and thus] impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson*, 460 U.S. at 793.

It is not the calendar date, or the relationship to other state deadlines, but the relationship to the deadlines in the Washington State major party candidate selection process that makes the deadlines for minor parties and independents "relatively early" and therefore suspect.

The Court in *Anderson* summarized the difficulties arising from a relatively early deadline. Not only are campaigns based on later developments made impossible, but the minor party campaign itself is made marginal and insignificant:

> When the primary campaigns are far in the future and the election itself is even more remote, the obstacles facing an independent candidate's organizing efforts are compounded. Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure and voters are less intersted in the campaign.

Anderson, 460 U.S. at 792, citing *Bradley v. Mandel*, 449 F.Supp. 983 at 986-987 (1978) (findings of fact of three judge district court).

The reasons for the lack of public and media interest in the elections at the primary stage are not difficult to discern. The record relects that fewer than half the registered voters participate in presidential election years, generally fewer than one-third in other primary elections. The electorate is apparently aware that the September primary is not really an election, because in it no one can be elected. The most a candidate can gain is the nomination of his or her party for the race on the election ballot in November. In other words: "The purpose of a primary election is to narrow the field of candidates to one per party, in order that the general election might be reserved for major struggles, not intra-party feuds." *Cross v. Fong Eu*, 430 F. Supp. at 1038 n.2. The Washington system inappropriately relegates minor parties' already selected candidates to this mechanism in which internal party politics and candidate selection by the major parties are what is perceived by the public to be at stake. Since there was only a single SWP candidate on the primary ballot, without explanation, a reasonable voter might assume that this candidate would appear on the general election ballot as the SWP nominee, as could a single major party candidate for the nomination.

In short, prior to the amendments, major and minor party nominees alike campaigned from the September candidate selection process to the November general election, participating in the "major stuggles" of ideas, programs, and political visions. The new restrictions have effectively eliminated minor party candidates for statewide office prior to the identification of major party nominees, prior to the sharpening of the issues and the signficant events of the real campaign, and have relegated minor parties to the political thicket of the "intra-party feuds" of the primary candidate selection process.

E. The 1977 Amendments Inflict On Minor Parties The Very Evils The Restrictions Are Supposed To Eliminate.

If the primary election is offered to minor parties as a constitutional substitute for general election ballot access (AB 18-19)--as "their chance" to reach the electorate--why are minor parties not deserving of the protection from a cluttered and confusing ballot the state ostensibly has a compelling interest in protecting? The general effect of the amendments was to take minor party nominees off the general election ballot (which was not crowded) and put them on a primary ballot (which is crowded).

The specific effect of these new restrictions on Plaintiffs was to take cadidate Peoples off what would have been a three candidate ballot and put him on what became a 34 candidate ballot. This in the name of reducing ballot crowding and voter confusion!

The relatively crowded primary ballot arises from the differential treatment of major party candidates, allowing them on the primary ballot as a result of a simple self-declaration, without the nominating convention petition requirement imposed on minor party candidates. There is no numerical limitation on major party candidates for the nomination in the primary election. This delays the possibility of any effective debate on the major issues in the election until after the field of candidates has been limited to one per party. Meaningful candidate forums, community meetings, public debates would be impossible until after the primary election has taken place, given the crowd of candidates competing in the primary.

All of the evils of unlimited ballots discussed in the cases ballot clutter, frivolous candidacies, voter confusion--prevent minor parties now stuck in the primary from effectively participating in the real election campaign, to reach out to the electorate with new ideas.

> By limiting the opportunities of independent minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. "The primary values protected by the First Amendment--a profound national commitment to the principal of debate on public issues should be uninhibited, robust, and wide-open," --are served when election campaigns are not monopolized by the existing political parties.

Anderson, supra, at 460 U.S. 794. It is such a monopoly on the general election process that the Court of Appeals appropriately restrained when it found the relegation of minor parties to the primary election unconstitutional.

III. THE COMBINED EFFECT OF THE EXTRA BURDENS NEWLY IMPOSED ON MINOR PARTIES HAS SUBSTANTIALLY BARRED THEM FROM PARTICIPATION IN GENERAL ELECTIONS FOR STATEWIDE OFFICE.

A. The Effect On Minor Parties Has Been Dramatic.

Historically, the elections of greatest interest to minor parties such as the Socialist Workers Party have been for state-wide office, such as Governor, and national office, such as U.S. Senate. There are two obvious reasons for this: first, the program of the Socialist Workers Party focuses on fundamental issues of national policy such as military affairs and the control of the economy. These issues are more appropriately addressed at a national level of government, or at least state-wide. Second, minor political parties are, by definition, new or small. Their base of support is frequently concentrated in one or a few areas, most often urban. By means of a state-wide campaign they can bring their new and different ideas to a larger audience, to voters who are frequently unfamiliar with their message. State-wide campaigns for state and federal offices are seen as an essential method of expanding the range of possibilities considered by the public in what is seen for most citizens of the United States as the primary, if not sole, means of exercising any political choice: the elections.

For these reasons, the election for Governor has attracted the widest participation by minor parties. As summarized by the Court of Appeals:

> At least one minor party appeared on the general election ballot in every Washington gubernatorial election from 1896 to 1976 except 1952. Two or minor party candidates qualified in all but two of these elections. Forty minor party candidates appeared on the general election ballot for state-wide offices in the five general elections between 1968 and 1976.

JS at A-4.

As Table I, at page 5-6 above indicates, the number of minor party candidates participating in the U.S. Senate elections has been somewhat smaller than in the Governor's race, but still regular.

The Court of Appeals fairly characterized the effect of the new 1977 restrictions on minor parties as working "a striking change" on the choices available to Washington voters:

> According to the affidavit of Washington Supervisor of Elections, since 1977 minor parties "have not been successful at qualifying candidates for the state general election ballot for state-wide offices." Although one or more minor parties nominated candidates in each of the four state-wide elections held between 1978 and 1983, none qualified for the general election ballot. In 1984 one of four minor party candidates nominated qualified for the general election ballot.

JS at A-4.

These figures are supported by the record. JA 79. They should be contrasted with the misleading tables presented by the Appellant at page 8 of this brief. The Chart is an apparent attempt to obscure the admitted exclusion of minor parties from state-wide races by loading the table with unidentified candidates for local office such as county commissioner, state legislator, and so forth, from various unidentified communities around the state of Washington. These figures were not put on the record before the Disrict Court or the Court of Appeals below, and rightly so, because they do not relate to any issue before those courts, which were not asked to consider or rule upon elections to local office. The only issue raised by the pleadings or ruled upon by the courts below was the effect of the restrictions on the 1983 election for U.S. Senate, and other similarly situated candidates for state-wide office who have been, almost universally, excluded from the general election ballot.

The state devotes precisely two paragraphs to its discussion of the crucial question: "What has been the effect of Washington's system on minor parties?" These are the two paragraphs on page 22 of Appellant's Brief which discuss the newly created tables lumping together state-wide candidates with those for local office such as county commissioner, etc. With regard to the offices at issue in

this case, namely state-wide offices such as U.S. Senate, we have merely the Supervisor of Elections' blanket admission of failure of the new electoral scheme to let minor parties on the ballot, which was cited by the Court of Appeals, and the single sentence in the State's Brief which only admits, in the most understated language, the crucial facts of this case: "For state-wide offices, minor party candidates have not done well since 1977." AB 22. They have not, and it is because of the unjustified 1977 ballot law amendments.

B. No Evidence Supports The Appellant's Attempt To Blame Minor Parties For Their Own Exclusion From The Ballot.

In its two-paragraph attempt to explain the almost total exclusion of minor parties from the state-wide ballot on page 23 of its Brief, the state admits that since there is nothing on the record to support their position, "we can only surmise." The state goes on to argue, nevertheless, that the exclusion of minor parties from the state-wide general election ballot should be blamed on the minor parties themselves: on their lack of spending, or their lack of effort.

It is true that there may be a correlation between the level of spending and electoral success. In fact, some 73 percent of voters surveyed thought campaign spending had "a great deal of effect" on the outcome of the election. Such feelings lead to "growing political alienation, declining confidence in political institutions, and steadily decreasing voter turnout." Shockley, "*Corruption, Undue Influence and Declining Voter Confidence*," 39 Miami L. Rev. 377, 379.[21] *See also Wright, "Money and the Pollution of*

[21]In support of this assertion, Shockley cites a University of Michigan study asking citizens the following question: "Would you say that the government is pretty much run by a few big interests looking out for themselves or that it is run for the benefit of all people?" Gradually, more people have responded that they believe that a few big interests run government. In 1958 only 18% of the respondents agreed with that view, but by 1980 76% believed that a few big interests run government. Opinion Roundup, 4 Pub. Opinion 34 (1981). Shockley also cites W. Crotty & G. Jacobson, American Parties in Decline (1980), 5, 13 noting that "in comparison with 21 other democratic countries, the United States ranks last...non-voters are basically inactive on all levels. If people do not vote, the chances are excellent that they will not participate in any other form of political process. In effect, they remain outside the political system, unrepresented and ignored."

Politics, 82 Colum. L. Rev. 609 (1982); E. Drew, *Money and Politics* (1984); T.M. Sell, *Riding the Milkwagon: The Effect of Money on the Outcomes of Legislative Races, 1974-1982* (Washington State Public Disclosure Commission, 1982).

It is clear, nevertheless, that restrictions which would bar minor parties from the ballot because of their lack of affluence would be unconstitutional. *Lubin v. Panish*, 415 U.S. 709 (1974). There may now be the equivalent of a $100,000 filing fee to be a "serious" candidate for U.S. Congress, if seriousness is to be measured solely in terms of spending, and related electoral success. But to institutionalize such a requirement, which is the logical extension of the State's argument, would seem directly in conflict with the principle of *Bullock v. Carter*, 405 U.S. 134 (1972) (invalidating excessively high filing fee).

Furthermore, to exclude a third or fourth point of view from the otherwise two party debate in the election campaign, the central political forum in our democracy, on the grounds that the minority point of view is inadequately funded is to turn the First Amendment on its head. *See* Meiklejohn, *Free Speech and Its Relation to Self Government* (1948).

The time-honored commitment of the First Amendment to "free, robust, and wide-open" debate, *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), recognizes that the main danger is the exclusion of a point of view, not the inclusion of too many. "That the air may at times seem filled with verbal cacophony is...not a sign of weakness but of strength." *Cohen v. California*, 403 U.S. 15, 25 (1971). And certainly it would be stretching a point to argue that a third point of view, in addition to the major parties' points of view which are so similar on many issues, would create a "verbal cacophony" in the general election. "'Public

discussion is a citizen's duty.' As a society we have more to fear from an inert than an active citizenry. Fear and repression menace stable government; speech does not." Powe, "Mass Speech and the Newer First Amendment," 1982 Supreme Court Rev. 243, 281, citing *Whitney v. California*, 274 U.S. 357, 375-377 (1926) (Brandeis, concurring).

The Court in *Buckley v. Vallejo*, 424 U.S. 1 (1976) and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) recognized that even the rich have a right to freedom from unjustified burdens on their participation in elections. ("Governmental action which may have the effect of curtailing the freedom to associate is subject to the strictest scrutiny." *Buckley*, 424 U.S. at 25) (State must show compelling interest, *Belotti*, 435 U.S. at 786). Thus, to enhance the effectiveness of the marketplace of ideas, the government can constitutionally promote equality only by multiplying and improving opportunities for disadvantaged candidates to express their views. Note, "Equalizing Candidates' Opportunities for Expression," 51 Geo. Wash. L. Rev. 113, 114-115 (1982).

If "enhancement" of the effectiveness of the marketplace of ideas by limiting the voice of actors so powerful they threaten to drown out others[22] is impermissible, as *Buckley* held, so much the more impermissible should it be to "enhance" the forum for the two major parties by excluding minor parties from the debate on the grounds of their relative "weakness" or inadequate funding.

Finally, the State speculates that exclusion of minor parties from statewide races might result "if minor parties tend to focus their efforts on local, rather than statewide races...." First, there is nothing on the record to support this pure speculation in the Appellant's Brief. Second, the facts of this case are that the *only* race Plaintiffs were involved in in the election at issue, was the race for U.S. Senate, a statewide race. Third, as discussed above, the issues involved in races for federal office and statewide

[22] *Cf. Red Lion Broadcasting v. FCC*, 395 U.S. 367, 387 (1969) ("the right of free speech for a broadcaster, the user of a sound truck or any other individual does not embrace the right to snuff out the free speech of others.").

office are the ones that are most attractive to minor parties, and therefore, historically, have attracted the most minor party participation and effort. Neither logic nor the record lend any support at all to this "surmise," and no weight should be given by this Court to the Appellant's suggestion that minor party lack of money or lack of attention to statewide races justify exclusion of minor parties from the statewide general election ballots.

C. The Courts Below Appropriately Limited The Scope Of The Decision To The Statewide Office Issues Raised In This Case.

The Plaintiffs below brought this case to challenge their exclusion from the election for the office of United States Senate. They supported their challenge to the constitutionality of the statute, as applied to them, by evidence that it had a similar effect on similarly situated voters and candidates for other statewide offices throughout the life of the statute at issue--namely, those involved in statewide office elections such as United States Senate and Governor. The State did not challenge this delineation of the issues before the trial court or before the Court of Appeals.

Now, for the first time, before this Court, the State apparently argues that the courts below should have considered a different issue, more to its liking: the effect of the statute on minor parties running for local offices, such as county commissioner, etc. Or perhaps the State is complaining that the Court of Appeals evaluated the statute as applied, rather than finding it unconstitutional on its face.

Sometimes a statute is so substantially overbroad that the Court *should* invalidate it on its face. *E.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). However, frequently when a challenge is made to a statute as applied, by one engaging in protected activity, the Court limits its holding to the protected activity, leaving the statute to be potentially applied to other activities. *E.g., Spence v. Washington*, 418 U.S. 405 (1974). The validity of this principle has

been specifically applied in the context of the First Amendment protections for minor parties' participation in election campaigns. In *Brown v. Socialist Workers*, 459 U.S. 87 (1982), the Court did not strike down the public disclosure provisions as unconstitutional on their face, but held them invalid only as applied, to the SWP, as a "minor" party. Even a statute which is challenged with a broad, facial attack may be found valid in some of its applications and invalid in others. *See*, eg., *Metromedia Inc. v. City of San Diego*, 453 U.S. 490, 521 n. 26 (1985).

The fact that Plaintiffs, seeking to participate in a statewide election for U.S. Senate, did not claim to be burdened by the application of these restrictions to elections for local offices, such as county commissioner, does not make their exclusion from participation in the critical statewide election in question constitutionally permissible. Courts, even more than legislatures, ordinarily proceed "one step at a time." *Cf. Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955). The State here presents no substantial reason why it would be impossible, or even difficult, to continue to enforce the challenged restrictions as to local elections while returning to the *status quo ante* with regard to statewide elections.

In previous cases, this Court has had no difficulty making a decision limited to the portions of an electoral scheme which were presented for decision, *see, Moore v. Oglivie*, 394 U.S. 815 (1969), even if this arguably left the statutory scheme in an irrational patchwork. *See Ill. St. Bd. of Elec. v. SWP*, 440 U.S. 173, 191 (1979) (Rehnquist, concurring). But again, there is no suggestion that such is the result here. Other states have recognized the differential difficulty in ballot access at the local and statewide levels, and such schemes have been upheld. *American Party of Texas v. White*, 415 U.S. 767, 775 n.7 (1974) (higher percentage of electorate petition signatures required for local office than for state office) (*compare Ill. St. Bd. of Elec. v. SWP, supra:* higher absolute number of signatures for local office qualification than for state office would be irrational).

Given the difference in difficulty of qualification

demonstrated by the record here, in the absence of any substantial justification for the differential burden offered by the State, we are left with the superficially attractive but empty argument of bare "equal treatment." Such abstract justifications of measures which are unjustifiably discriminatory as applied are uniformly rejected:

> As we have written, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Anderson v. Celebrezze*, *supra* 460 U.S. at 801, *quoting Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

The Court of Appeals correctly limited its decision to the statewide office issues presented in the case before it, and came to the correct conclusion.

D. The Exclusionary Mechanism Of This Law Falls Unequally On New And Small Political Parties And Discriminates Against Voters Who Wish To Cast A Collective Vote Of Dissent From The Status Quo.

> Even though the drafting of election laws is no doubt the handiwork of the major parties that are typically dominant in the state legislatures, it does not follow that the particular interests of the major parties can automatically be characterized as legitimate state interests.

Anderson v. Celebrezze, 460 U.S. at 803 n.30. On the contrary.

> Because the interests of minor parties and independent candidates are not well represented in the state legislatures, the risk that the First Amendment rights of these groups will be ignored in judicial decision making may warrant more careful judicial scrutiny.

Id. at 793. n.16.

A necessary concomitant of majority rule, under our repulican form of government, is the protection of minority interests. *United States v. Carolene Products Company*, 304

U.S. 144, 152 n.4 (1938); J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 73-88 (1980) (judicial role in seeing that certain groups are not "fenced out" of the pluralist process).

The Court of Appeals correctly notes that, "as a practical matter, the [1% vote requirement] affects only minor parties." JSA-2 What motivated this discriminatory new burden on minority participation in elections? The answer to this question can be gleaned from the legislative history of the 1977 amendments.

One reaction to the declining voter confidence in the major political parties has been the formation of new or "protest" political parties. An example of this, discussed in Appellant's Brief at p.8, was the 1976 formation of the "OWL" Party. This group was organized by a well known entertainer in the state capitol, and fielded a full slate of candidates for state-wide office under the slogan "Throw the Rascals Out," with a platform intended as a lampoon of the major parties. Its ballot placement functioned as the equivalent of a "none of the above" vote option.

This managed to deeply offend both the Democratic and Republican members of the state legislature.

As a result, the risk warned against in *Anderson*[23] came to pass. In one of the few declarations of legislative intent recorded in the sparse legislative history preserved in the State of Washington, one of the sponsors warned his colleagues of the dangers posed by the minor parties targeted by the bill:

> They appear to be taking on the characteristics of a major party and unless maybe some of us get to work they might present a bigger problem.

1977 House Journal 696, Washington State Legislature. The resulting change in election law did help the major parties by keeping minor parties out of statewide general elections.

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[23] *Supra*, at 793 n. 16.

But such sentiments would of course be anathema to the Founding Fathers, such as Thomas Jefferson who saw political upheaval as "productive of good. It prevents the degeneracy of government and nurses a general attention to... public affairs. I hold...that a little rebellion now and then is a good thing." Letter to Madison, January 30, 1798. More recently, we were reminded:

> Our form of government is built on the premise that any citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment and the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumberable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy and dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.

Sweezy v. New Hampshire, 354 U.S. 234, 250-251 (1957).

Some scholars have advanced the theory that legislative behavior may be explained as seeking the single-minded goal of re-election. *See* C. Sunstein, "Interest Groups in American Public Law," 38 Stan L. Rev. 29, 48 n.78 (1985). The danger to minority rights has been seen as increasing the need for a branch of government to take a "sober second look" at political outcomes. *See* A. Bickel, *The Least Dangerous Branch* (1962).

In *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Court invalidated the exclusion of "non-related individuals" from the Food Stamp Program, on the grounds that the exclusion reflects "a bare...desire to harm a politically unpopular group," which "cannot constitute a legitimate governmental interest." *Id.* at 534. *See also City of Cleburne v. Cleburne Living Center*,

105 S.Ct 3249 (1985).[24]

While invidious intent is not required for a ballot access restriction to be invalid,[25] it certainly makes a difference. "Even a dog," as Justice Holmes said, "distinguishes between being stumbled over and being kicked." O. Holmes, *The Common Law* 3 (1881). (Quoted in Sunstein, *supra.*, at 80).

When the apparent purpose and obvious result of the new restrictions on minor parties challenged here is so clearly invidious, the deference otherwise due a legislative determination is certainly diminshed.[26]

If the First Amendment is to work anywhere, it must be here in political campaigns:

> [I]f it be conceded that the First Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people," then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

Monitor Patriot Co. v. Roy, 401 U.S. 265, 271-272 (1971).

IV. THE STATE HAS FAILED TO ESTABLISH THAT IT HAS ADOPTED THE LEAST RESTRICTIVE MEANS OF LIMITING MINOR PARTY ELECTION PARTICIPATION TO A REASONABLE NUMBER OF SERIOUS CANDIDATES.

In addition to demonstrating the compelling state inter-

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[24]The purpose of heightened scrutiny is to detect the results of illegitimate motives in cases in which such motives are especially likely to be at work. *Cf* Brest, Foreword, "In Defense of the Anti-Discrimination Principle," 90 Harv. L. Rev. 1 (1976).

[25]*E.g.*, *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979).

[26]L. Tribe, *American Constitutional Law* 774 (1978) (courts should be wary of governmental attempts to control the electoral system, which is the fundamental check on its power.)

est that requires its new restrictions on political participation, the state must also demonstrate that less restrictive means would not suffice to accomplish any legitimate state goal. "The regulation can survive only if the governmental interest outweighs the burden, and cannot be achieved by means that do not infringe First Amendment rights as significantly." *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 n.7 (1983). This is particularly the case in limitations on the fundamental rights of political association and voting: "'Precision of regulation must be the touchstone in an area so closely touching our most precious freedom.'" *Anderson*, 460 U.S. at 806, *quoting NAACP v. Button*, 371 U.S. at 438.

The record contains no such demonstration by the State here. The evidence on the record is totally contrary to any such assertion. *First*, as pointed out above, *see* Argument II. A. at page 26, the other states of the Union have successfully regulated minor party ballot access with nominating petition signature requirements alone, without the addition of the second stage primary vote requirement which has so adversely affected minor parties in Washington.[27] *Second*, the historical experience in the State of Washington itself belies the need for the new restrictions. The successful regulation of minor party ballot access under the pre-existing nominating petition signature requirements constitutes a solid demonstration of the effectiveness of these less restrictive means in this very state. *Third*, the legislature adopted the new restrictive provisions only by specifically rejecting a less restrictive bill. 1977 House Journal 497. This version of the bill preserved the former system of placing minor party nominees who met the nominating signature requirements directly on the general election ballot, with no primary vote requirement in addition. This less restrictive scheme was passed by the House by a large margin of 70 to 20. 1977 House Journal 696. Only when the Senate repeatedly refused to accede to the

[27]*Cf. Lubin v. Panish*, 415 U.S. 709 (1974) (filing fee not permissible as means to limit the ballot and avoid voter confusion when petition signatures would be less restrictive of voting and associational rights).

less restrictive House version, 1977 Senate Journal 1611-12, did the House finally agree to pass the more restrictive Senate version. 1977 House Journal 1976.[28]

Fourth, at the same time the legislature added the second tier primary vote qualification requirement, it increased the petition signature requirement. A much greater increase in the petition signature requirement would certainly have served to keep "crank" or frivolous candidates off the ballot (if there were any evidence that such increased restrictions were necessary) without excluding the serious minor parties harmed by the scheme actually adopted. The record indicates that the Socialist Workers Party has gathered nation-wide over 500,000 signatures on nominating petitions to obtain ballot placement for its candidates in the various states. Affidavit of Hickler, J.A. 51.[29] Finally, as an example of such a less restrictive alternative scheme, Appellees would point out the provisions of House Resolution 2320: "A bill to enforce the guarantees of the First, Fourteenth, and Fifteenth Amendments to the Constitution of the United States by prohibiting certain devices used to deny the right to participate in certain [federal] elections." A copy of the bill is attached hereto as Appendix B. This bill would limit ballot access restrictions imposed by the states on candidates in federal elections, such as this one for U.S. Sentate, to a petition signature requirement of not more than 1/10 of 1% of the total vote for the office in the previous election, and would provide that the signatures might be gathered in at least a seven month period. Such a measure would permit a substantial increase in Washington's petition signature requirements, while allowing minor parties more time in which to gather them than the one day presently allowed, and would prohibit the primary vote requirement

[28]*Cf. Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (disricting scheme invalidated when Missouri Legislature had before it an alternative plan with smaller deviations from the ideal).

[29]*Cf. American Party v. White, supra*, 415 U.S. at 779 (SWP met signature requirement of 22,354 qualified voters.)

that now so effectively excludes them from the general election.

Appellees are not arguing that the House Bill, or any particular ballot access procedure is constitutionally required. But the existence of a simple, adequate, less restrictive alternative is certainly relevant to the necessity of a measure which has purged the ballot of the few minor parties who qualify candidates under the existing scheme. A limitation of First Amendment freedoms must be no greater than is necessary[30] or essential to the protection of the particular governmental interest established. *Procunier v. Martinez*. 416 U.S. 396 (1974). *See also Bursey v. United states*, 466 F.2d 1059, 1088 (9th Cir. 1973) ("When First Amendment interests are at stake, the government must use a scalpel, not an ax."). The State in this case clearly went much further than necessary especially where there was no apparent need for more ballot restrictions in the first place.

[30]The Court of Appeals correctly pointed out that the exclusionary effect of this new legislation may simply have been a mistake, citing the memorandum from the Office of Appellant stating that some 75% of the parties and candidates would qualify for the general election ballot, though "contrary to this prediction, minor party candidates have been substantially eliminated from Washington's general election ballot. J,S, A-4. Of course, an exclusion not intended by the legislature, or taken into account, cannot be "closely tailored" to a state goal. "When delicate and cherished First Amendment rights are at stake...the constitutional tolerance for error diminishes dramatically." *Minneapolis Star*, *supra* at 460 U.S. 589 n. 12. *See U.S. v. Carolene Products Co.* 304 U.S. 144, 153 (1938) (Statute would be unconstitutional as applied to one not causing targeted harm.). And *see Chastelton Corp. v. Sinclair*, 264 U.S. 543, 547, (1926) ("A court is not at liberty to shut its eyes to an obvious mistake.").

CONCLUSION

This issue presented in this case is the impact of Washington's new ballot access laws on minor parties' ability to run in statewide general elections. The facts show that this impact has been draconian. This profound effect on fundamental constitutional rights has not been justified by any of the State's arguments, particularly when there are any number of less invasive alternatives available to advance the State's purported interests. The Court of Appeals correctly held this statute invalid as applied to statewide races. This Court should affirm.

Respectfully submitted,

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April 30, 1986

APPENDIX A: CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution Of The United States:
Article I
§ 4. Election of Senators and Representatives

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

AMENDMENT I.

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free excercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT XVII.

Popular Election of Senators

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

Statutes: Washington Revised Code

29.24.020 [New] Nomination by convention or write-in —Date for convention—Multiple conventions by single party

Any nomination of a candidate for partisan public office by other than a major political party shall only be made either: (1) In a convention held on the last Saturday immediately preceding the first day for filing declarations of candidacy specified in RCW 29.18.030 or fixed in accordance with RCW 29.68.080 or 29.68.090; or (2) as provided by RCW 29.51.170. A Minor political party may hold more than one convention but in no case shall any such party nominate more than one candidate for any one partisan public office or position.
Amended by Laws 1977, Ex.Sess., ch. 329, § 2, eff. June 30, 1977.

29.24.020 [Former] Minor parties must hold convention on state primary day.

Any new or minor political party is not entitled to participate in a state primary election but must nominate candidates for public office in a convention held on the same day that state primary elections are held.

29.24.030. [New] Requirements for validity of convention

To be valid, a convention must:

(1) Be attended by at least a number of individuals who are registered to vote in the election jurisdiction for which nominations are to be made, which number is equal to one for each ten thousand voters or portion thereof who voted in the last preceding presidential election held in that election jurisdiction or twenty-five such registered voters, whichever number is greater;

(2) Have been called by a notice published in a newspaper of general circulation published in the county in which the convention is to be held at least ten days before the date of the convention stating the date, hour, and place of meeting. The notice shall also include the mailing address

of the person or organization sponsoring the convention, if any.

29.24.030 [Former] Minor party convention-Procedure.

To be valid, a minor party convention must:

(1) Be attended by at least one hundred registered voters; or in lieu thereof ten registered voters from each congressional district in the state of Washington;

(2) Have been called by a notice published in a newspaper of general circulation published in the county in which the convention is to be held at least ten days before the date of the primary election stating the date, hour, place of meeting and a general statement of the principles of the organization.

29.18.025. [New] Declarations of candidacy—Certain offices, when filed

Except where otherwise provided by state law, declarations of candidacy for the following offices shall be filed during regular business hours with the secretary of state or the county auditor no earlier than the last Monday in July and no later than the following Friday in the year in which the office is scheduled to be voted upon:

(1) Offices that are scheduled to be voted upon for full terms or both full terms and short terms at, or in conjunction with, a state general election; and

(2) Offices where a vacancy, other than a short term, exists that has not been filled by election and for which an election to fill the vacancy is required in conjunction with the next state general election.

29.18.020 [Former] What political parties may participate.

Only the names of major political parties shall be entitled to appear upon the primary election ballot after the names of the candidates affiliated therewith. The name of no other political party shall appear thereon.

29.18.020. [New] What candidates shall appear on ballot

The names of the candidates of the major political

parties and those independent candidates and candidates of minor political parties who have been nominated pursuant to the provisions of chapter 29.24 RCW shall appear upon the partisan primary ballot: *Provided*, That candidates for the positions of president and vice president shall not appear on the partisan primary ballot. The name of no other candidate shall appear thereon.

29.30.100 [Former] General election ballots—What names to appear.

The names of the persons certified as the nominees resulting from a primary election by the state canvassing board or the county canvassing board shall be printed on the official ballot prepared for the ensuing election.

No name of any candidate whose nomination at a primary is required by law shall be placed upon the ballot unless it appears upon the certificate of either (1) the state canvassing board, or (2) the county canvassing board, or (3) a minor party convention, or (4) of the state or county central committee of a major political party to fill a vacancy on its ticket occasioned by any cause on account of which it is lawfully authorized so to do.

29.18.110 [New] Number of votes for appearance on general election ballot

No name of a candidate for a partisian office shall appear on the general election ballot unless he receives a number of votes equal to at least one percent of the total number cast for all candidates for the position sought. *Provided*, That only the name of the candidate who receives a plurality of the votes cast for the candidates of his party for any office shall appear on the general election ballot.

If there are two or more positions of the same kind to be filled and more candidates of a party receive a plurality of the votes cast for those positions than there are positions to be filled, the number of candidates equal to the number of positions to be filled who receive the highest number of votes shall be the nominees of their party for those positions.

APPENDIX B

H.R. 2320

A bill to enforce the guarantees of the first, fourteenth, and fifteenth amendments to the Constitution of the United States by prohibiting certain devices used to deny the right to participate in certain elections.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. BALLOT ACCESS RIGHTS

A State shall not use any device to abridge or deny the right of an idividual to be placed as a candidate on, or to have such individual's political pary, body, or group affiliation in connection with such candidacy placed on, a ballot or similar voting materials to be used in Federal election.

SEC. 2. DEFINITION OF DEVICE

For the purposes of this Act, the term "device" means any requirement, condition, or prerequisite to being placed on, or having individual's political party, body, or group affiliation placed on, a ballot or similar voting materials, other than a requirement, condition, or prerequisite described in section 3.

SEC. 3 ALLOWED REQUIREMENTS FOR BALLOT ACCESS.

(a) Petition. - A State may impose any or all of the following requirements, conditions, or prerequisites:

(1) That an individual seeking to excercise rights protected by by this Act present a petition stating in substance that the signatories desire such individual's name and political party, body, or group affiliation to be placed on the ballot or other similar voting materials to be used in the

Federal election with respect to which such rights are to be excercised.

(2) That the political party, body, or group affiliation, if any, of such individual be shown on such petiton.

(3) That such petiton, to be effective, must have not more than the greater or -

(A) 1000 signatures: or

(B) a number of signatures equal to 1 tenth of 1 percent of the number of registered voters on the date of the most recent previous Federal election, if any, for the office for which such individual is a candidate who voted in such election for such office.

(4) That such petition may be signed only by persons residing anywhere in the bounds of the geographic area from which an indivdual is to be elected to such office.

(5) That such petition may be circulated only during a period -

(A) beginning not later than the 270th day before the date of the election with respect to which such rights are to be exercised; and

(b) ending not earlier than the 60th day before the date of such election.

(b) PARTY VOTE - A State may impose the requirement, condition, or prerequisite that, in order to have an individual's political party, body, or group affiliation placed on a ballot or similar voting materials to be used in the Federal election with respect to which rights protected by this Act are to be exercised, without having to satisfy any requirement relating to a petition under section 3(a), that or another individual, as a candidate of that political party, body, or group, must have received whichever is the lesser of-

(1) 20,000 votes: or

(2) 1 percent of the votes cast:

in the most recent general Federal election for President or Senator in that State.

SEC. 4. RULEMAKING.

The Attorney General may make rules to carry out this Act.

SEC. 5. GENERAL DEFINITIONS.

As used in this Act-

(1) the term "Federal election" means a primary, general, special, or runoff election for the office of -

(A) President of Vice President:

(B) Senator, or

(C) Representative in, or Delegate or Resident Commissioner to, the Congress: and

(2) the term "State" means a State of the United States, the district of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

No. 85-656

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1985

SECRETARY OF STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Appellant.

v.

SOCIALIST WORKERS PARTY, ET AL.

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF APPELLANT

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Argument

INTRODUCTION AND SUMMARY

The arguments of the Socialist Workers Party (hereinafter "SWP") sift down to three major interrelated contentions; (1) That the strict scrutiny standard, not the rational basis standard, should apply in evaluating Washington's 1% requirement for a minor party candidate to move from the state September primary election to the November general election ballot; (2) That the State must

show a *compelling need* for this 1% requirement; and (3) That the 1% requirement has resulted in minor parties generally not reaching the general election ballot for statewide offices, and that such a result renders that requirement invalid as applied to those offices.

We take up each of these contentions in turn.

1. We first show that under this Court's decisions, the strict scrutiny standard is not applicable in a case such as this. For the 1% requirement is no more than Washington's effort to exercise a right which this Court has recognized many times and which it most recently described as follows:

> The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates. *Jenness v. Fortson*, 403 U.S. 431 (1971); *American Party of Texas v. White*, 415 U.S. 767.

Anderson v. Celebrezze, 460 U.S. 780, at 788, n. 9 (1983).

Neither *Jenness v. Fortson*, 403 U.S. 431 (1971), nor *American Party of Texas v. White*, 415 U.S. 767 (1974), applied the strict scrutiny test; and for good reason. Although those cases, as does this case, involved the election process, they in no way involved situations in which a State denied any of its citizens the franchise or diluted the effect of their vote. Rather, those cases involved, again as here, a State's effort to require a "preliminary showing of substantial support in order to qualify for a place on the ballot." If a state system involves denial of a voter's franchise or dilution of his or her vote, strict scrutiny is appropriate; but not when the system simply requires a preliminary showing of substantial support which reduces the number of candidates on the final election ballot.

For reasonable minds will differ as to what amount of support is "substantial," at what point a multiplicity of candidates who have virtually no chance of election be-

comes "wasteful" or "confusing," and where and how the line should be drawn between "frivolous" and "non-frivolous" candidates. *Anderson, supra.* These are all highly debatable matters.

Not surprisingly, States will differ in where they draw the lines and thus resolve the debate. There should thus be a wide range within which the judgments of the States will pass constitutional muster, and within which the strict scrutiny standard will be inapplicable. Beyond that range, strict scrutiny may well be appropriate, as in *Williams v. Rhodes*, 393 U.S. 23 (1968). *Jenness* and *Williams* together tell us roughly where that range is; and Washington is well within it.

2. Washington itself, in 1977, changed the lines which it had previously drawn. Indeed, before 1977, it had, for all practical purposes, no requirement at all of a showing of "substantial" support in order for a party to place its candidate on the ballot. The prior Washington requirement for a minor party nominating convention of 100 voters or ten from each congressional district is hardly "substantial" in any meaningful sense, even when — as was the case before 1977 but not after — those voters attending the convention on primary election day had to forego the opportunity to vote in the primary.

This previous liberality to be sure, cannot be proven to have put the whole election system in serious jeopardy. Rather, the legislature appears to have simply decided that such broad permissiveness was potentially "wasteful," "confusing," and encouraged "frivolous" candidates; it therefore decided to require some "substantial" showing of support. Washington decided, in short to exercise the right which other States had been exercising, as shown in *Jenness* and *American Party*, but which Washington had previously foregone. And Washington is not required to show a compelling need in order to begin to assert that right.

3. The success of minor party candidates under the 1977 change differs markedly for statewide positions, such as U.S. Senator or Governor, and non-statewide positions,

such as U.S. Representative, positions in the state legislature, and local government offices. Statewide, the minor party successes have been few; non-statewide, the failures have been few, if any. In claimed recognition of this difference, the court below invalidated the 1% requirement only as applied to statewide positions, despite the fact that the complaint had requested that it be invalidated *in toto*. Just as the SWP would prefer to avoid any consideration of these non-statewide results for minor parties, so too it would avoid consideration of another group subject to the 1% requirement, viz., independent candidates for statewide office.

For the difference in results under the 1977 change in statewide elections for minor party candidates on the one hand and for independent candidates on the other is likewise striking. Of the five independent candidates who have run for statewide office since 1977, four have met the 1% requirement and gone on to the general election. Note: under Washington law, the process for "Independents" is the same as that for minor parties.

The SWP would have the Court disregard these non-statewide results for minor parties and statewide results for independents as irrelevant. However, the races are indeed relevant; for they confirm that with reasonable diligence and effort, and with reasonably attractive candidates, the 1% requirement *can* be met. The differences in results should not be laid to the 1% requirement, which is completely uniform in its application — a uniformity which the lower court has destroyed. Rather, the difference should be laid to the obvious source of the difficulty, i.e., the failure of the minor parties to expend the efforts on candidacies at the state-wide level that they apparently do at the non-statewide level.

It is not unreasonable to expect that minor parties may tend to have their base of support localized. The SWP, for example, may have its base of support in our industrial areas, such as the Seattle-Tacoma area, rather than in the agricultural communities of eastern Washington. While this may be a factor in the differing results, it simply means that a minor party must, in order to meet the 1% requirement statewide, either exploit its local base more effectively, or expand it to other areas. It should not mean that the State must abandon a uniform standard in order to make up for a party's failure to do either.

I

THE STRICT SCRUTINY STANDARD SHOULD NOT BE APPLIED IN THIS CASE

This case involves, all would agree, the rights of a candidate to ballot access, and the concomitant rights of citizens to vote for that candidate and to associate for the advancement of their political beliefs by supporting that candidate. The SWP argues, however, that this agreed starting point necessarily triggers the application of the strict scrutiny standard in this case. (See SWP Br. 19-24).

This argument is entirely too simplistic, and has been rejected by this Court. See State Br. p. 14-15, discussing *Bullock v. Carter*, 405 U.S. 134, 142-143 (1972), which explicitly recognizes that under *Jenness v. Fortson*, 403 U.S. 431 (1971), ballot access requirements do not automatically trigger the strict scrutiny test. See also, *Clements v. Fashing*, 457 U.S. 957, 963-965 (1982), (Opinion of Justice Rehnquist).

Because of the central importance which this question of the proper standard of review has assumed in the SWP's argument, we would make some additional comments.

The right to vote implicated here "* * * differs radically from the right to vote that underlay the reapportionment and franchise cases." Tribe, American Constitutional Law, 779 (1978). When a citizen is denied the right to vote, or the right to cast a vote that has the same weight as any other vote, strict scrutiny is obviously appropriate. But we are not dealing with that sort of law here. As explicitly recognized in *Bullock*, this difference is critical in

determining the standard of review. See *Bullock, supra,* 405 U.S. at 142, 143, quoted at State Br. 14, 15.

This is not to suggest that strict scrutiny is *never* appropriate in a ballot access case; for such a suggestion would embody the same simplistic approach as does the argument of the SWP on this issue. As shown by *Williams v. Rhodes,* 393 U.S. 23 (1968), a State's restrictions may go so far beyond the range of reasonableness that strict scrutiny is appropriately invoked.

And this is precisely the point, we suggest, which the Court had in mind in *Bullock* when it stated:

> "The existence of such barriers does not of itself compel close scrutiny. Compare *Jenness v. Fortson* * * * with *Williams v. Rhodes.* * * * In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Bullock,* 405 U.S. at 143.

The extent and nature of the impact on the voters will thus have a critical bearing on the standard of review to be chosen. In making that choice, realism requires taking into account the uncertainties which a State necessarily faces when it exercises its right to impose ballot access requirements, and the same uncertainties which this Court faces in reviewing such requirements.

> The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates. *Jenness v. Fortson,* 403 U.S. 431 (1971); *American Party of Texas v. White,* 415 U.S. 767."

Anderson v. Celebrezze, 460 U.S. 780 at 788, n. 9 (1983).

How and where is the State to draw a line between "frivolous" and "serious" candidates or parties? It must do so, realistically by some numerical measure of "substantial support."[1] But what should that precise measure be? And

[1]The SWP, it should be noted, declares that it is not "frivolous," because it has been "a nationally organized, serious political party for over forty years." (SWP Br. 1). While we do not doubt that the SWP has a long history, and is intensely serious about its goals and principles, a State can measure "seriousness" only by some uniform numerical measure of support. The State will encounter obvious constitutional problems if qualitative and subjective, rather than objective numerical criteria are used to determine which parties are "serious" and which are not.

would it be better cast in terms of support in previous elections, as here? Or in terms of voter petitions, as in *Jenness*?

Attempting to answer these questions, the only thing one knows for certain is that, at some point, clutter can be excessive, and that the multiplicity of candidates becomes "wasteful" and "confusing," and presents the risk of impairing, to some extent, the voting process. Precisely where that point is, however, and the extent of impairment of the process at any given point, is unknown and probably unknowable — and certainly perpetually debatable.

A State must answer these questions and define some point, nevertheless. The "best" answers and the "best" point are impossible to determine. Identical systems may produce different results in different States; and the same system may produce different results in the same State in different years.

Uncertainties of this sort counsel, we suggest great deference by the judiciary in allowing the state legislatures to develop electoral systems and to draw the necessary lines as they find appropriate. Yet the SWP, by invoking the strict scrutiny standard, would have the judiciary engage in a "fine tuning" of the States' systems in the quest for a better or "less restrictive" system. The practical results of such an ongoing review of election standards can only be guessed at. This Court should decline the invitation.

A critical question remains. Does Washington's 1% requirement present a case, such as *Williams, v. Rhodes, supra,* in which strict scrutiny was proper? A brief comparison of the Ohio system involved in *Williams* and Washington's system involved here provides the answer.

Ohio law required nominating petitions equal to 15% of the gubernatorial vote in the previous election, which in 1968, the year in question, amounted to 433,100. The American Independent Party obtained more than that number during the first six months of 1968. However, the deadline for filing the petitions was February 7. There were also very stringent organizational requirements imposed upon a new party. So even filing the petitions by the February deadline would not have guaranteed access to the ballot.

In light of those restrictions, there was hardly room for any uncertainty as to the results of that system, or for any argument that Ohio was making a good faith effort to balance competing interests, or to winnow out only frivolous parties and candidates. The system made it all but impossible for any party but the Republican and Democratic parties to reach the ballot. The interest in free and open political debate, unmonopolized by those two parties, was seriously infringed. And under those circumstances, putting Ohio to the strict scrutiny test was obviously proper.

Although the point at which the strict scrutiny standard will be triggered in a case involving ballot access restrictions cannot be fixed precisely, *Williams, supra,* sheds important light on where that point is. When restrictions have the obvious effect — and perhaps the purpose as well — of allowing the two major parties to monopolize access to the voters at the ballot box or to monopolize as well the political debate during a political campaign, or to do both, then strict scrutiny is properly invoked.

Washington's system is utterly different from the Ohio system. The 1977 change which established the 1% requirement for minor parties simply eliminated the "free ride" to the general election which these parties had previously enjoyed. While they continue to have virtually guaranteed access to the electorate, that access carries them only to the primary election. If the voters overwhelmingly

reject their candidates and their message at the primary, that is the end of the line for that election.

Under Washington's system, there is, we submit, one result about which there can be no uncertainty. The 1% requirement eliminates from the general election only those parties and candidates having absolutely no chance of winning in that election. Those parties and candidates have presented their message to the voters in the primary, and been overwhelmingly rejected. Surely strict scrutiny should not apply to a system which simply says to them: "That's the end. Try again in another year." Particularly where, as here, other candidates of the party remain on the ballot in some races to carry the party's message.[2]

The SWP argues, however, that access to the primary ballot is irrelevant because no one is elected, i.e., actually put into office, in the primary. (SWP Br. 12). This argument overlooks the fact that in Washington the primary is designed to winnow out precisely those candidates and parties having no chance at all of attaining office by success in the general, or of otherwise affecting the outcome in the general. In a real sense, the voters themselves determine the "frivolous" candidate who is to be excluded from the general election. By its argument, the SWP is in effect asserting a right to appear on the general election ballot *no matter how little support it has previously garnered, and no matter how certain its defeat or lack of impact in the general election might be.* Stated another way, the SWP is claiming a right to protection from the risk and consequences of overwhelming rejection by the voters in the primary. This Court has never recognized any such right. Any certainly the strict scrutiny standard should not be applied to establish such a right.

---

[2]Eg., in 1984, the Socialist Workers' candidate for the U.S. House of Representatives position from the Seattle area remained on the ballot, as did the Amicus Libertarian Party candidates for the statewide Treasurer position, and for one U.S. Representative and one State Representative position. Supplemental citation, 1984 Washington Election Results. (JA-146). Both parties' gubernatorial candidates had failed to gather 1% support, however.

Finally, a word concerning *Jenness v. Fortson*, 403 U.S. 431 (1971), upon which we rely heavily. (See State Br. 19-21). It is undisputed that *Jenness* did not apply the strict scrutiny standard.[3] The SWP understandably contends that *Jenness* should be disregarded on the grounds that a nominating signature on a petition is much easier to obtain than a vote in a primary election. (See SWP Br. 24-25; see also ACLU Br. 38-31). Even if obtaining the signature is easier, the question is — How much easier?

The importance of this question can be seen from the table contained at page 20 of our opening brief. That table compares the Georgia 5% requirement, using 1984 Washington election figures for the race for Governor. Under the

[3]A prominent commentator, Prof. Tribe, criticizes the Court's ballot access cases, such as *Williams*, *Jenness*, *American Party*, and *Storer v. Brown*, 415 U.S. 724 (1968) for failure to articulate and consistently apply a single standard of review. Speaking of *Williams* and *Jenness*, he states that "[i]n its next major ballot access decision [*Jenness*], the Court dramatically reversed field [from *Williams*]," because in *Jenness*, "it appeared that the Court subjected the Georgia laws to only minimal scrutiny." Tribe, American Constitutional Law, 781 (1978). He also states that "[t]he most baffling aspect of *American Party* and *Storer* was the standard of review being applied," and notes that, although verbally invoked, strict scrutiny was not actually applied. Ibid., 783.

The criticism for failure to use a single standard of review, we suggest, is not well taken. In some cases, such as *Williams*, strict scrutiny may be appropriate; in others, such as *Jenness*, *American Party*, and *Storer*, it will not.

While we disagree with his suggestion that a single standard of review should apply in all these cases, Professor Tribe's discussion raises an important question as to exactly what the strict scrutiny standard means in practical application in this context. In *American Party*, for example, the Court found the Texas ballot access requirements to be "* * * reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways." 415 U.S. at 781. See also 415 U.S. at 782, n. 14. If the strict scrutiny standard involves no more than focusing upon the State's objectives to find the compelling interest, and then examining whether the access requirements are reasonably related to those objectives, we would not have difficulty with the application of such a single standard. But the SWP would have strict scrutiny mean much more than that. And we accordingly have raised the threshold question of whether strict scrutiny should be applied at all, in this broadened sense which in effect shifts the burden of proof from the challenger of the system to its defender.

Georgia system, 122,883 petition signatures would be needed to gain a place on the general election ballot. Under the Washington system, 9,140 primary votes would be needed.[4]

Is a primary vote, under the Washington system, twelve or thirteen times as difficult to obtain as a petition signature under the Georgia system? We see no reason why it should be. And the SWP (and the ACLU) offer none.

To put the matter another way: if the decision below is affirmed, Washington would have the clear alternative of adopting the system approved in *Jenness*. Is there any reason at all for concluding that the SWP, or any other minor party, would have greater success in reaching the general election under that system than they have under the present 1% requirement? We suggest that there is no such reason.

Accordingly, *Jenness* should be controlling not only the question of the standard of review to be applied, but on the ultimate disposition of this case as well.

II

BECAUSE STRICT SCRUTINY DOES NOT APPLY, THERE IS NO REQUIREMENT THAT THE STATE SHOW A COMPELLING NEED FOR THE 1% REQUIREMENT

The SWP would use its strict scrutiny argument to

[4]The table at State Br. 20 is erroneous in giving 94,449 instead of 122,883 as the total number of petition signatures required under the Georgia 5% system. See the same table, with the correct mathematical calculation, at JS 12.

It should also be noted that the ratio between the number of petition signatures required under the Georgia system and the number of primary votes required under the Washington system will vary, depending upon the percentage of registered voters who participate in a particular race. If primary participation is 50%, the ratio will be ten signature petitions for every primary vote. If primary participation is — to take an extreme — 25%, the ratio will be twenty to one. The ratio also increases as the race in question is further down the ballot with fewer voters participating.

put the State into a constitutional box. Under that argument, the State could repent of its former liberality, and require a showing of substantial support for a party to gain a place on the general election ballot, only if it can show a compelling need for the change. Since the State cannot show that, before the 1977 change which established this requirement for minor parties, such parties were so cluttering up the ballot that they seriously jeopardized the integrity of the election process, then the State is effectively locked into its old system. (SWP Br. 44).

As we have shown, this argument sinks at the first step; the strict scrutiny standard is not applicable. (It should be noted that the District Court held the Washington statute did meet the compelling interest test. Order JS App C-4, para. 14). But consider the consequences if that standard were applicable and if the State were thus locked in. In 1976, the year immediately preceding the adoption of the 1% requirement, twelve parties appeared on the general election ballot, eight of which had candidates for Governor on that ballot.[5] (See State Br. p. 8, and J.A. 27). We certainly do not contend that even this proliferation of parties was shaking the process apart. Again, how many is "too many" cannot be determined by anyone with certainty. Yet that proliferation may well have caused the Washington legislature to ask whether some of these candidacies and parties might not be "frivolous," however defined, and whether their inclusion on the general election ballot might not be "wasteful and confusing." See *Anderson, supra,* 460 U.S. 780 at 715, n. 9 (1983).

In fact, the legislature asked this question, thought there was a problem, and tried to do something about it by adoption of the 1% requirement. See Memorandum to the Conference Committee on ESSB 2032, attached hereto as

[5]In the 1976 race for Governor, four of the minor parties, including the Social Workers, had less than a third of one percent of the total vote, and the other two minor parties had less than one percent. (J.A. 27).

Appendix A.[6] That memorandum summarized the reasons for the various proposals for changing the election laws, and suggested a compromise between the Senate and House proposals — a compromise that was essentially adopted by the committee and the Legislature. As that memorandum shows, the drafters of the compromise proposal knew that the 1% requirement embodied therein would have an effect on minor party candidates, but, on the basis of their analysis of 1976 election data, believed that the effect would be reasonable and that the proposal would "provide existing minor political parties with a reasonable opportunity to qualify their candidates for the general election and present their platforms in a responsible manner." (App. A, p. 2).

Yet the SWP's strict scrutiny argument would prohibit the Legislature from addressing the problem which it perceived, at least in the absence of some absolute necessity. And thus, by reason of its inability to show a "compelling need," Washington would be prevented from exercising a right enjoyed by every other State, viz., the right to require a substantial showing of support in order to eliminate frivolous candidacies and the wastefulness and potential confusion which they would entail.[7]

[6]This memorandum is found at pages 12 and 13 of Exhibit B to the Defendant's Reply to Plaintiff's Motion for Summary Judgment, CR-23, and is referred to in the Court of Appeals Decision. (JS A-4).

[7]The Legislative history indicates that one particular party, the OWL, or "Out With Logic" party may have been a factor in the Legislature's re-examining the previous system. See the exchange found at 1977 House Journal 696, Washington State Legislature.

> Mr. Nelson (Dick) yielded to question by Mr. Deccio. Mr. Deccio: "Representative Nelson, you used the term 'frivolous minor parties.' Would you give us an example of what a frivolous minor party is?"
>
> Mr. Nelson (Dick): "Well, I think, to give you a good definition, I think a frivolous minor party is a party that really doesn't have a platform and isn't seriously proposing solutions to the problems of this state and this nation. There was at least one on the ballot I think that turned the election process into a comedy. That

III

THE RESULTS UNDER THE 1% REQUIREMENT DO NOT JUSTIFY INVALIDATING THAT REQUIREMENT. RATHER, THOSE RESULTS SHOW THAT MINOR PARTIES AND THEIR CANDIDATES CAN MEET THAT REQUIREMENT WITH REASONABLE DILIGENCE.

In evaluating the impact of the 1% requirement, it is useful to distinguish three groups of candidates. The first consists of minor party candidates running for statewide office. The second consists of minor party candidates running for non-statewide office. And the third consists of independent candidates running for statewide office. All three groups were subject to the 1% requirement and to the same time frames for each step in the election process. Yet the Court below expressly rejected the experience of the third group, independents running for statewide office, as irrelevant (JS A-4); and it tacitly disregarded the experience of the second, minor party candidates running for non-statewide office. The SWP would have this Court similarly treat the experience of those two groups as irrelevant. And for good reason; for that experience shows where the SWP's problem really lies.

The success rates for the first and second groups can

I would call a frivolous minor party. They appear to be taking on the proportions of a major party and unless maybe some of us get to work they might present a bigger problem."

The reference to a party that "turned the election process into a comedy" is to the OWL party. For examples of such "comedy," see the statements of OWL party candidates contained in the 1976 Official Voters Pamphlet, pp. 16, 19, 20, 21 and 23. This pamphlet is printed by the Secretary of State and mailed to all Washington voters at state expense.

Representative Nelson's remarks are quoted, but only in part, and thus misleadingly, by the SWP (SWP Br. p. 41) and the ACLU (ACLU Br. p. 19).

The antics of the OWL Party, however, were not the primary source of concern which prompted the adoption of the change. The legal and practical administrative concerns are set forth at J.A. 77, 78, and in the memorandum attached hereto as Appendix A.

be determined fairly closely, though not precisely. From Table II of our opening brief (State Br. 8), it will be seen that 47 minor party candidates entered a September primary in the years subsequent to 1977. These candidates exclude presidential candidates, but include candidates for both statewide and non-statewide office. The table also excludes the special 1983 election for U.S. Senator. By adding in that election, the total number of candidates becomes 48.

Of those 48, 37 went on to the general election, as also seen from that table. This leaves eleven candidates who failed to meet the 1% requirement. Although our table does not identify these candidates by statewide or non-statewide office, Table I of the SWP brief is helpful here in making that identification. (SWP Br. 5, 6). That table shows seven minor party candidates who failed to go on to the general, all in either a U.S. Senate race or the race for Governor. Presumably, the remaining four failures were either minor party candidates for non-statewide office, candidates for other unidentified statewide offices, or a combination of both.

Factoring in the one minor party candidate who did go on to the general, the success rate for the first group, minor party candidates for statewide office, is somewhere between one out of eight and one out of twelve. But, the success rate for the second group, minor party candidates for non-statewide office, would be somewhere between thirty-six out of thirty-six — 100% — and thirty-six out of forty.[8]

The success rate for the third group, independents running for statewide office, can be calculated precisely. Four out of five went on to the general. (See J.A. pp. 135, 136, 146).[9]

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[8]Again, the precise success rate for both groups will be dependent upon the actual distribution of the four unaccounted failures to the one group or the other.

[9]The suggestion of the Court below that only three independents went on to the general election is in error. (JS A-4).

What accounts for the very high success rate for the second and third groups, and the very low success rate for the first? Although one cannot answer this with certainty, some probable explanations are obvious. As the SWP correctly states: "Their [minor parties;] base is frequently concentrated in one or a few areas, most often urban." (SWP Br. 33). The SWP, for example, may well have its base of support, such as it is, primarily in the Seattle-Tacoma industrial area, rather than the agricultural areas of eastern Washington. Additionally, the minor parties may simply not work as hard on statewide races as they do on non-statewide races. They must either expand their base of support geographically or exploit that local base more intensely. That the first alternative is quite possible is clear from the success of statewide independent candidates, the third group. And that the second alternative is also quite possible is clear from the success of minor party candidates in non-statewide elections, the second group.

Surely the State's uniform requirement for all three groups must not be tossed aside simply because the first group pursues neither alternative. Indeed, the major vice, as a practical matter, in the decision below is that it makes a shambles of a State's effort to have a single uniform system, and requires instead that the State tailor its system for the supposed needs of the least diligent and least successful group.

We have examined the experience of the second and third groups in more detail than in our opening brief because of the SWP's vigorous assertion that this experience is irrelevant. (SWP Br. 33-40). Indeed, the SWP disparages our contention that the State should be free to adopt a single uniform standard, to be justified not by looking at the experience of minor parties in statewide races alone, but by looking at the experience of minor parties in non-statewide races and of independents in statewide races as well. The SWP calls our contention a "* * * superficially attractive but empty argument of bare 'equal treatment'." (SWP Br. 40).

We would suggest that this disparagement, and the SWP's efforts to have the Court ignore the experience of these other groups, are no more than an effort to avoid focusing on the most probable reasons for its lack of success. Further, the SWP seems to be suggesting that it would not only be permissible, but perhaps even constitutionally required, that Washington give disparate treatment to one or more of the three groups which we have discussed. (SWP Br. 40). A similar suggestion seems to be embodied in the SWP's complaint that the 1977 change put minor parties onto the more crowded primary election ballot and removed their almost guaranteed access to the less crowded general election ballot. The complaint, in effect, is that its candidates are deprived of a constitutional right by having to compete on the same terms as every other primary candidate.[10]

In answer, we would only note the obvious. The independent statewide candidates with whom minor party candidates are competing succeed where they fail. To require a State legislature to try to even things out, by jettisoning a single uniform standard and enacting instead some sort of political handicapping system for each of the various

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[10]During the period between the end of the Depression and the 1976 election, a period in which minor parties had direct access to the general election, and thus did not have to face the competition of which the SWP here complains, their candidates do not seem to have been appreciably more successful in eliciting voter support in the general than they are now in the primary. See J.A. 25-27, which gives the vote for each candidate for Governor from 1896 through 1980. From the 1940 election through the 1976 election, twenty minor party candidates ran for Governor, and only two gained 1% or more of the total vote. During the period from 1896 through 1936, many more minor party candidates gained over 1%.

The listing of the gubernatorial vote to which we refer is also appended to the *amicus* brief of the ACLU and National Lawyers Guild. Referring to that listing, the brief states: "Prior to 1977, when minor parties routinely appeared on the general election ballot, they quite often obtained more, often much more, than one percent of the votes." (ACLU Br. 32). The statement is correct only with respect to the period before 1940; for the subsequent period, it is absolutely incorrect.

groups, is fraught with obvious practical — and constitutional — dangers.

CONCLUSION

For the reasons given above and in our opening brief, the decision below should be reversed.

Respectfully submitted,

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APPENDIX A

SECRETARY OF STATE

June 4, 1977

MEMORANDUM

TO: Senators C. W. Beck, *Gary Grant*, and Lois North; and Representatives Otto Amen, John Hawkins, and Dick Nelson

FROM: Duane C. Woods and Donald F. Whiting

RE: Conference Committee on ESSB 2032

From our discussions with members of the conference committee and the staff of both the House and Senate Committees on Elections about questions which were raised during the first meeting of the conference committee on ESSB 2032 (Minor Party Nominating Procedures), we feel that, despite the mechanical differences in the two approaches, both bills have the same basic objectives: to discourage frivolous use of the minor party nominating procedures and to eliminate the present exclusion of persons nominating minor party candidates from voting on unrelated items on the state primary election ballot (this subject is still in litigation in Federal District Court). The essential difference between the two versions of the bill — the direct nomination of minor party candidates by convention vs. the qualification of the party by petition and nomination of the candidates in the primary — arises out of a secondary concern about how much control minor parties should have over the selection of candidates to represent their viewpoints and the importance of exposure of their party platforms through the medium of the Voters' and Candidates' Pamphlet.

We feel that all of these considerations can be accommodated successfully by combining some of the elements of each proposal. We offer the attached proposal as a sug-

gestion of how to retain the essential ingredients of each approach in a single bill which still meets the common objectives of the House and Senate and would provide existing minor political parties with a reasonable opportunity to qualify their candidates for the general election and present their platforms to the electorate in a responsible manner. In the attached proposal, we suggest retaining the nominating convention as proposed in sections 1-4 of the House version of the bill with the exception of lowering the minimum number of registered voters required for nominations from twenty-five to ten (this will reduce the likelihood of multiple, regional conventions while retaining the principle that each nomination should be an expression of genuine support from the voters of the jurisdiction for which the nomination is made). The candidates nominated at the minor party convention would appear on the primary election ballot as provided in section 8-12 of the Senate version of the bill with the exception that each individual candidate must receive at least one percent of the vote cast for that position in the primary in order to appear on the general election ballot.

Based on the returns of the 1976 state general elections, eight of the twelve parties which nominated candidates in 1976 would have qualified under this suggested compromise (the same number as under the House version of the original bill) and all of these parties would have qualified candidates for the general election (fifty of the sixty-five non-presidential candidates would have survived the primary and had statements in the Candidates' Pamphlet).

We are offering this suggestion for discussion by the conference committee at its subsequent meetings. We will be happy to discuss the suggested draft with members of the committee or answer any questions you may have at any time.

NO. 85-656

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1985

Secretary of State of State of
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v.

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Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION AND NATIONAL LAWYERS GUILD

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QUESTION PRESENTED

Is the State of Washington's statutory requirement that prohibits candidates for public office from appearing on the general election ballot unless they receive at least 1% of the voter base for that office in the primary election a violation of the First and Fourteenth Amendments to the United States Constitution?

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INTEREST OF AMICI

All parties have consented to the filing of this brief in support of appellees.

The American Civil Liberties Union Foundation ("ACLU") is a national organization comprised of more than 250,000 members. The American Civil Liberties Union of Washington Foundation ("ACLU of Washington") is the Washington affiliate of the ACLU. The ACLU and its affiliates traditionally have been devoted to the protection and enhancement of fundamental liberties and basic civil rights.

The National Lawyers Guild is an organization, founded in 1937, of lawyers, legal workers and law students, with a membership of over 7,050 and chapters throughout the United States, including Seattle, Washington. The

organization is dedicated to openly work to maintain and protect our civil rights and liberties in the face of persistent attacks upon them.

This Court has repeatedly recognized the importance of rights of electoral participation and political association, and has stated that "[t]he impact of candidate eligibility requirements on voters implicates basic constitutional rights." Anderson v. Celebrezze, 460 U.S. 780, 786 (1983) (footnote omitted). The instant controversy deeply implicates these important political and associational interests. Indeed, it is the position of amici that Washington's restrictions on minor parties' access to the general election ballot impermissibly abridges these fundamental rights of political expression and association. Amici

respectfully submit this brief to advance their position to this Court.

STATEMENT OF THE CASE

A. Introduction

Representative democracy rests upon the consent of the governed, and the legitimacy of this "consent" is ensured by permitting the people to freely and fairly choose their political leaders. Alexander Hamilton observed that the essence of representative government is "that the people should choose whom they please to govern them." 2 Elliot's Debates 257. Chief Justice Warren reiterated this basic proposition when he noted that representative democracy "is undermined as much by limiting whom the people can select as by limiting the franchise itself." Powell v. McCormack, 395 U.S. 486, 547 (1969).

Washington's minor party ballot qualification system abridges fundamental constitutional rights to vote,

to associate for political purposes, and to equal protection of the laws. Since the rights burdened by the Washington statute are fundamental, this statute should be strictly scrutinized. The restrictions imposed by the Washington statute are highly suspect not only because they burden First Amendment rights but also because they are intentionally aimed at minor parties.

Washington's statutory scheme significantly burdens protected rights by requiring minor party candidates to validate themselves by obtaining one percent of the vote on the primary ballot, and by mandating that a minor party (but not a major party) must select one candidate before the primary and list only that candidate on the ballot. In effect, the two express

statutory discriminations embodied in Washington's statute between major and minor parties combine to mean that major party adherents have a strong incentive to vote and select their nominee, while minor party voters have no choice between candidates at all and must vote only to validate their party.

By eliminating the minor party's best chance to compete with and gain supporters from the two major parties which dominate the political landscape, the Washington statutory ballot system all but destroys any practical opportunity minor parties have to gain a position on the general election ballot.

The Washington statute serves no compelling state interest, and, in fact, contravenes the only interest identified by appellant, that of preventing voter confusion. Although

preventing voter confusion may be a legitimate state interest, here the lack of any threat to that interest undeniably diminishes its strength. Furthermore, were the risk of voter confusion significant, Washington's statutory framework simply moves that risk from the general to the primary election ballot. In fact, this statutory scheme creates a risk of more, rather than less, voter confusion. The primary ballot is inherently longer than the general election ballot because it contains all of the potential nominees of the major parties, as well as one for each minor party. Since a major party primary candidate is not required to show any prior support and may be placed on the ballot simply at his word, there are often long lists of such candidates.

Thus, Washington fails to protect the voters from any significant risk of confusion, and merely shifts any such risk to the primary ballot, thereby imposing upon minor parties a very real risk that their right to appear on the general election ballot will be denied altogether.

Finally, even if the Washington statute were in fact a means to serve the asserted governmental interest, it is not the least restrictive means to that end, and is far more burdensome in theory and in practice than alternative means.

B. Factual Background

For over 70 years, the State of Washington successfully held elections pursuant to a statutory procedure which permitted minor parties to regularly participate in statewide elections on

the same basis as major parties. Minor party convention nominees were placed directly on the general election ballot. Indeed, in the 21 statewide elections held between 1907 and 1977, there was a minor party candidate for Governor in all but one election. See Appendix A, attached. In the other 20 elections, the number of minor party candidates ranged from one to six candidates per election. Throughout the course of this litigation, appellants have failed to demonstrate any evidence of voter confusion, cluttered ballots, or impairment of the integrity of the election process by frivolous or fraudulent candidacies during the 70-year history of Washington's prior law.

In 1977, the Washington Legislature revised the election procedures for minor parties, with the intention and

effect of adding a substantial new barrier to minor party ballot access. Before 1977, participation in the partisan primary was limited to major parties and was designed as an alternative to nominating candidates through a convention. The 1977 Legislature repealed RCW 29.30.100, which put minor party convention nominees directly on the general election ballot. The amended version of RCW 29.18.020 required the name of the single nominee of the minor party to be placed on the primary ballot, along with the names of all the multiple aspirants for the nomination of each of the two major parties, whose names appear on the ballot as a result of their simple declaration of candidacy. RCW 29.18.030, .110.

Voters, therefore, can choose to participate in the major party primary

selection process, or cast their primary election vote for the single minor party candidate, who has already been selected at the nominating convention. Unless the minor party candidate receives votes of more than one percent of the total number of votes cast in the primary, the party is excluded from the November general election ballot. No explanation of this requirement appears on the ballot. The actual effect of the one percent primary vote requirement barrier is to substantially impair minor party access to the general election ballot.

Almost seven years have passed since Washington's election law was amended. Since the amendments were passed, several minor party candidates have attempted to win a position on the general election ballot, but only one

has succeeded. The 1977 Amendments, as applied, have almost totally excluded minor party candidates from participation in the general election process for statewide offices. Although three well-known political figures have qualified for the general election ballot as "independent" candidates under the new scheme, minor parties have been effectively foreclosed from participation in the general election.

The Socialist Workers Party is not a frivolous or fraudulent party. It has been a nationally organized political party for over 40 years, and before the 1977 Amendments the party's candidates regularly achieved positions on the state's general election ballot.

The lawfully nominated candidate of the Socialist Workers Party in the 1983 Special Senatorial Election was Dean

Peoples. He was nominated by the convention procedure established by Chapter 29.24 RCW, and his nomination was duly certified by the Secretary of State. Because of the 1977 Amendments, his name was placed on the primary ballot instead of the general election ballot. His name appeared along with the names of 18 Democrats and 14 Republicans whose names were placed on the primary ballot simply as a result of their individual declarations of candidacy.

The race for both the Republican and Democratic nominations was hotly contested, and, consequently, the top four candidates (two Democrats and two Republicans) together polled approximately 98% of the vote, the other two percent being divided among the remaining 29 candidates. None of the

remaining candidates, including Socialist Workers Party candidate Dean Peoples, got anywhere near one percent of the vote. The primary contest, therefore, resulted in the candidate of the Socialist Workers Party being barred from the general election ballot altogether. As a result, the general election ballot carried the names of two candidates rather than three, and voters were given no alternative to the Democratic and Republican parties. This condition was a direct result of the statute at issue in this case.

ARGUMENT

I.

WASHINGTON'S MINOR PARTY BALLOT QUALIFICATION SYSTEM ABRIDGES FUNDAMENTAL RIGHTS TO VOTE, TO ASSOCIATE FOR POLITICAL PURPOSES, AND TO EQUAL PROTECTION OF THE LAWS

Restrictions on ballot access are suspect, particularly where, as here, they are explicitly directed at minor parties and burden the constitutional rights to political association and to vote for the candidate of choice. Those rights are not only fundamental in themselves but are "preservative of all other rights," Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886), and thus have deserved the greatest judicial protection. Anderson v. Celebrezze, 460 U.S. 780, 806 (1983); NAACP v. Button, 371 U.S. 415, 438 (1963). Where the burden on those rights is not only substantial

but is disparate, and the disparity is the product of an explicit discrimination against minor parties, then the Equal Protection Clause also requires that the categorization, as well as the burden, be essential to the satisfaction of a compelling state interest, but no more restrictive than necessary. The Washington scheme must be measured against such demanding standards.

A. The Rights Burdened by the Washington Statute Are Fundamental and Require Strict Scrutiny.

"The impact of candidate eligibility requirements on voters implicates basic constitutional rights." Anderson, 460 U.S. at 786 (footnote omitted). Those "distinct fundamental rights" include "'the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless

of political persuasion, to cast votes effectively.'" Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (quoting Williams v. Rhodes, 393 U.S. 23, 30 (1968)). Minor parties play an important role in obtaining the benefits of those constitutional rights. Their campaigns serve to disseminate ideas and sometimes attain office. They have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream. Id. at 186. Provisions that operate to keep minor parties off the ballot significantly burden fundamental rights. Id. at 184.

A "significant interference" with a fundamental right is sufficient to invoke serious constitutional concerns

and strict scrutiny by the courts. Bates v. City of Little Rock, 361 U.S. 516, 523 (1960). When the "vital rights" involved here "are at stake, a State must establish that its classification is necessary to serve a compelling interest." Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. at 184. Accord Williams v. Rhodes, 393 U.S. 23, 31 (1968) (strict scrutiny); American Party of Texas v. White, 415 U.S. 767, 780 (1974) (compelling state interest); Storer v. Brown, 415 U.S. 724, 729 (1974) (compelling state interest).

In Anderson, the Court elaborated on the test applicable to a facially neutral filing date provision that had the effect of hampering independent candidacies. To determine the validity of a challenge to such a provision, one

must (1) identify the scope and nature of the burden on protected rights; (2) weigh the strength of any interests that the restraint is argued to serve; (3) determine whether those interests are sufficiently well served to justify the restriction; and (4) assure that the restraint is precisely designed to burden protected rights no more than necessary. Anderson, 460 U.S. at 789, 806.[1]

B. Restrictions That Not Only Burden First Amendment Rights But Are Intentionally Aimed at Minor Parties Are Highly Suspect.

The provision in Anderson was neutral on its face, and the Court applied only the First Amendment. 460 U.S. at

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[1]The dissent in Anderson did not challenge the applicability of the enunciated test in a case such as this involving state elections but instead contended that the test did not apply to presidential elections, the standards for which are delegated to the states in the Constitution itself. 460 U.S. at 806-08.

786 n.7. In this case, however, the challenged provision is not facially neutral but is explicitly directed only to minor parties and independent candidates. While benefiting the two major parties surely is an understandable instinct of a legislature composed of members of such parties, such a purpose is hardly a legitimate state interest in itself. Id. at 803 n.30. The state's purpose is impermissible if that purpose is to "always, or almost always, exclude" all but the two major parties. American Party of Texas v. White, 415 U.S. at 783.

Courts would prefer to take prophylactic steps to assure that the majoritarian process works as constitutionally designed, rather than intervene in particular substantive decisions. It is therefore fundamental equal

protection doctrine that state action which intentionally alters the political system to make it more difficult for identified groups to press for their concerns and protect their interests is highly suspect. Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. at 184; Williams v. Rhodes, 393 U.S. at 30.

Where the identified groups or "factions" are minor parties that are by definition "not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny." Anderson, 460 U.S. at 793 n.16 (citing United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) and J. Ely, Democracy

and Distrust: A Theory of Judicial Review 73-88 (1980)).

That fear of majoritarian abuse has been realized here, where one of the sponsors of the bill was quite candid about the bill's purpose: minor parties "appear to be taking on the characteristics of a major party and unless maybe some of us get to work they might present a bigger problem." 1977 House Journal 696, Washington State Legislature. Such direct evidence is not necessary where a discrimination is expressed on the face of a statute rather than found only in the statute's impact, Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), but it surely confirms the wisdom of

strict scrutiny of express discriminations in the procedures governing access to and operation of the majoritarian process.

C. The Washington Statutory Scheme Significantly Burdens Protected Rights.

The Court has recognized that the state imposes a significant burden on First Amendment rights when it limits access to the general election ballot to parties that have made some sort of preliminary showing of significant support from potential voters. See, e.g., Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. at 184. The method employed by the states in prior cases was to require the collection of petition signatures equal to a particular percentage of the electorate. Id.

Washington is the only state that requires minor parties to validate themselves by obtaining one percent of the vote on the primary ballot, which historically has been used to choose major party candidates. Washington further provides that minor parties, but not major parties, must select one candidate before the primary and must list only that candidate on the ballot.

Appellant repeatedly and erroneously equates the primary with the general election. Brief of Appellant at 18-19. The original, and in other states still the only, purpose of the primary election is to allow parties to choose which of their two or more candidates will be selected to run in the general election. Thus, the relatively few voters who have chosen to vote in primaries have traditionally been "the

strongest major party adherents." Hudler v. Austin, 419 F. Supp. 1002, 1011 (E.D. Mich. 1976), aff'd sub nom. Allen v. Austin, 430 U.S. 924 (1977). Minor party adherents have traditionally had no reason to vote in primary elections. By selecting as the validation mechanism for minor parties a process whose purpose is to select among party candidates and which generally attracts faithful major party supporters, Washington loaded the dice against validation.[2]

Even without the historical baggage of the primary mechanism, the 1977

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[2]While a state cannot be foreclosed by voter reliance upon its traditions from making necessary changes the Equal Protection Clause may sometimes require, and not just allow, a state to move "one step at a time" (Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489 (1955)), where less careful and incremental change would combine with voter inertia to burden fundamental rights. The 1977 Washington Legislature opted instead for dramatic, and unconstitutional, restructuring.

Amendments created a strong disincentive to participation by minor party adherents, because their parties are statutorily prohibited from choosing among their candidates at the primary election and must instead do so at a convention some time earlier. RCW 29.24.020. In American politics, voters generally turn out in substantial numbers for contested candidate elections, not to validate proposed tax levies or constitutional amendments. American Party of Texas v. White, 415 U.S. at 789 & n.21. Even when passively supported by most of the electorate, such validation elections often fail to meet turnout requirements.

Thus, the two express statutory discriminations between major and minor parties--minor party validation at the primary and only one minor party

candidate at the primary--combine to mean that major party adherents have a strong incentive to vote and select their nominee, while minor party voters have no choice between candidates and must vote only to validate their party.

Of course, many of the voters who would vote for a minor party candidate in the general election are not loyal adherents to the party, and may even be generally faithful to a major party, but are looking for a candidate whose views more closely approximates their own. This Court has recognized that minor party voters often have some affiliation with a major party, Anderson, 460 U.S. at 791 n.12; that "the principal policies of the major parties change to some extent from year to year," Williams v. Rhodes, 393 U.S. at 33; that wavering or fringe major party

supporters will not know a given season's policies until the standard bearers who will design and espouse those policies are selected, Anderson, 460 U.S. at 791; and that such major party "intervening events" will often "serve as the focal point" for a grouping of voters who decided that they are dissatisfied with the major parties. Id. "Indeed, several important third-party candidacies in American history were launched after the two major parties staked out their positions and selected their nominees at national conventions during the summer." Id. at 791-92 (footnote omitted).

By eliminating the minor party's best chance to compete with and gain supporters from the two major parties that admittedly dominate the political system, the Washington scheme all but

destroys the critical role of minor parties "'as an outlet for frustration, often as a creative force and a sort of conscience, [and] as an ideological governor to keep major parties from speeding off into an abyss of mindlessness." Id. at 794 n.17 (quoting from A. Bickel, Reform and Continuity, 79-80 (1971)). The Court in Anderson subsequently adopted Professor Bickel's "perceptive" observation that "'[t]he characteristic American third party, then, consists of a group of people who have tried to exert influence within one of the major parties, have failed, and later decide to work on the outside.'" 460 U.S. at 805 (quoting Bickel, supra, at 87-88 n.11).

The Washington statute forces a weak major party supporter or one who is unsure of the party's path to choose

between selecting between the major party candidates and validating a minor party option that the voter will not care to pursue if the major party selects the correct candidate and path. Most voters will gamble on investing their single votes in the major party race.[3] Further, the

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[3]In the general election, voters have to choose between helping decide between the candidates of the major parties or voting for a minor party. The group of voters who would find themselves positioned on the political spectrum somewhere between the two major parties are not likely voters for minor parties, which are generally found on one end or the other of the spectrum. In the primary, however, the voters facing such a dilemma are those positioned on the spectrum between the edge of one major party and a minor party and would thus be likely minor party voters if there were not a contested race between candidates on different points of the major party's own spectrum. See Anderson, 460 U.S. at 794 n.17. The Washington statute not only makes it more difficult to obtain the validation of those likely voters, but leaves those voters with no attractive option at the general election if the "wrong" candidate wins the major party primary. "[T]he right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." Williams v. Rhodes, 393 U.S. at 31.

statute denies minor parties of the support of those numerous voters who do not participate in primary elections but would have supported the minor party candidate in the general election in light of the candidate selected by the pertinent major party.[4] The Washington statute thus substantially interferes with the very characteristic that this Court and Professor Bickel have identified as creating third-party support.

Moreover, voting in a primary election is an active event that is sufficiently burdensome as to deter many,

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[4]As a result, the Washington statute is more burdensome than a system, such as that analyzed in American Party of Texas v. White, that precludes a voter from voting in the primary and signing a subsequent petition but that allows petitions from the numerous voters who did not make it to the primary polling booth. 415 U.S. at 778. See id. at 789 & n.21 (substantial numbers of voters do not participate in primaries).

and often most, major party supporters from voting to choose their nominee. The parties can ask people to vote but have no way to force them into the poll booths. Signing a petition, on the other hand, is a relatively passive event. Petition gatherers can confront the "voters" and can do so at places that are convenient to the voters since they are already there. The appeal for support can be made right in the "polling place," and wavering supporters will be much more likely to accede to the personal appeal. The large group of people who find it inconvenient to vote on the one particular election day will, on the other hand, be at a convenient spot for signing petitions and being solicited sometime during the petition period, which runs for many days and is not limited to weekdays or

to particular hours of the day, as the one primary day is limited. The signature gatherer likely suffers "no suffocating restrictions whatever upon the free circulation of nominating petitions." Jenness v. Fortson, 403 U.S. 431, 438 (1971).[5] He does not have to worry that the target's attention will be diverted to a hotly contested major party primary race. Indeed, the petition gatherer will probably be able to solicit signatures from people who already plan to or have voted in a

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[5]In Jenness, for example, the validator could sign more than one petition and could also vote in the contested party primary. 403 U.S. at 438-39. Accord Libertarian Party of Florida v. Florida, 710 F.2d 790, 794 (11th Cir. 1983), cert. denied, ____ U.S. ____, 105 S. Ct. 117 (1984); Libertarian Party v. Bond, 764 F.2d 538, 542 (8th Cir. 1985).

major party primary.[6] Thus, appellant errs in assuming that judicial acceptance of certain validation percentages in the petition context necessarily justifies usage of the same or smaller percentages in the primary vote context.

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[6]The Washington primary validation scheme shares one characteristic with the petition mechanisms analyzed in American Party of Texas v. White and Storer v. Brown. In those cases there were prohibitions on signing petitions and voting in the major party primary contest. Even if this were the only critical characteristic, the prohibitions in those two cases were held to be justified by the interest in precluding minor party supporters from voting in and attempting to distort the results of major party primary races. White, 415 U.S. at 786; Storer, 415 U.S. at 733-36. Washington, however, has repeatedly disavowed any such interest. In White, minor parties were required to hold their conventions at the time of the major party primaries but were allowed to continue to collect signatures after that time, if necessary. 415 U.S. at 778. In addition, Storer was undermined by the decision in Anderson. See 460 U.S. at 816-17. (Rehnquist, J., with White, Powell, & O'Connor, JJ., dissenting).

The difficulty in obtaining primary votes, as opposed to petitions or even general election votes, is shown by the history of minor party performance in Washington before and after the statute's enactment. Prior to 1977, when minor parties routinely appeared on the general election ballot, they quite often obtained more, often much more, than one percent of the votes. See Appendix A. Since 1977, when the same parties have appeared instead on the primary ballot, they have been far less successful in garnering support. Appellant made no effort to establish below that this disparity was due to anything but the obstacles created by using the primary as the validation mechanism.

Actual voting patterns must also be examined to determine the real impact

of the Washington statute as a whole in the context it was designed to serve. See Storer v. Brown, 415 U.S. at 742; Mandel v. Bradley, 432 U.S. 173, 177 (1977). The patterns dramatically establish that the scheme directly and substantially reduced minor party support, and made validation an "impractical alternative" for diligent, previously successful parties, and thus interfered in fact with the constitutional rights at issue. Storer v. Brown, 415 U.S. at 745-46.

Appellant's brief presents various tables that purport to show minor party representation in primary and general elections before and after the 1977 Amendments. Brief of Appellant at 7. The tables are misleading because they combine both statewide and local elections. Local elections are largely

irrelevant because the 1977 Amendments were only challenged and declared unconstitutional as applied to statewide elections. Indeed, the state presented no information relating to local elections to the courts below. Therefore, this Court should ignore information relating to local contests. Jenkins v. Anderson, 447 U.S. 231, 234 n.1 (1980).

With respect to statewide elections, which are at issue in this suit, since 1977 there have been only twelve minor party candidates in statewide primary elections. All but one of them was eliminated from the general election ballot. By contrast, between 1968 and 1976 40 minor party candidates appeared on the general election ballot.

This Court has held that "to comply with the First and Fourteenth Amendments

the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot." Storer v. Brown, 415 U.S. at 746. In no reported case has a ballot restriction been upheld where its practical effect was to substantially eliminate minor party representation on the ballot.

The effects of the primary election validation provision are more fully set forth in the opinion of the Ninth Circuit and in the Appellee's brief.

The same impermissible exclusion of minor parties that has occurred in Washington was also found in the only other state which imposed a primary system for minor party validation. In 1976 Michigan enacted a requirement that minor parties obtain only .3 percent of the primary vote. Although the

facial validity of the statute was upheld by a three-judge district court and this Court, Hudler v. Austin, 419 F. Supp. 1002, supra,[7] a few years of experience with the statute convinced the Michigan Supreme Court that the burden was substantial, unjustified, and in violation of the United States Constitution. Socialist Workers Party v. Secretary of State, 412 Mich. 571, 317 N.W.2d 1 (1982).

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[7]This Court's summary affirmance in Hudler is not dispositive.

This Court has "often recognized that the precedential effect of a summary affirmance extends no further than 'the precise issues presented and necessarily decided by those actions.'" Anderson, 460 U.S. at 784 n.5 (quoting Mandel v. Bradley, 432 U.S. at 176). Accord Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. at 180-83; Socialist Workers Party v. Secretary of State, 412 Mich. 571, 317 N.W.2d 1, 3 & n.10 (1982). In Hudler, the district court did not examine the statute as applied and compared petition and primary percentage requirements without apparent awareness of the reasons the primary mechanism would prove to be far more burdensome in practice. See 419 F. Supp. at 1011.

The Michigan Supreme Court found that the effect of the statute was heightened because the primary mechanism eliminated ideological alternatives before the electorate could know the two major party candidates and their issues. 317 N.W.2d at 6-7. A primary validation requirement less than one-third as stringent as Washington's thus was struck down on the basis of its actual impact and principles developed in cases in which a petition system with numerical percentages up 15 times greater were upheld.

The demand for any showing of significant support in an election designed as a contest for candidates of the major parties imposes a disparate burden on the voting and political associa'ion rights of minor parties that is severe in theory and in

practice. In these circumstances, the first part of the Anderson test, the burden of the restriction imposed, requires that the second, or justification, part be strongly satisfied by the state. That did not happen in this case.

II.

THE WASHINGTON SCHEME IS UNNECESSARY TO THE SATISFACTION OF ANY COMPELLING STATE INTEREST AND IN FACT CONTRAVENES THE INTEREST IDENTIFIED BY APPELLANT

Appellant identifies only one interest served by the Washington statute, and that sole justification is put forth rather timidly. Appellant contends that Washington has the right to require that minority parties demonstrate a modicum of support so as to eliminate a few marginal parties whose appearance on the ballot might one day create a list so long as to confuse

voters. The line between a policy that some minor parties are too many and that all minor parties are too many is a fine one, but is of great constitutional significance. Washington finds itself far to the wrong side of that line.

In the first place, there is no evidence in the record of problems relating to voter confusion before the 1977 Amendments were passed. Prior to 1976, there were no more than six minor party candidates for the statewide offices that the parties and courts below focused on. Appellant argues that twelve minor parties qualified and appeared in the 1976 election. Brief of Appellant at 8. However, these twelve parties did not appear in the same statewide race. There was no suggestion that Washington's voting

machines could not handle the names or that the major party candidates who interest most voters could get lost in the shuffle.

In assessing the constitutionality of a ballot restriction, Anderson holds that the strength and legitimacy of the state's interest must be taken into account. 460 U.S. at 789. Although preventing voter confusion may be a legitimate state interest, the lack of any threat to that state interest undeniably diminishes its strength. This was not a situation in which a dozen or more unknown candidates were causing a loss of focus on more realistic candidates. Compare Lubin v. Panish, 415 U.S. 709, 715-16 (1974) (twelve minor candidates might be too many) with Williams v. Rhodes, 393 U.S.

at 47 (Harlan, J., concurring) (eight is not too many).

Where a constitutionally burdensome statute is directed at only a hypothetical evil, one which has not in fact occurred in the state which enacted the statute, there is reason to believe that the evil may be a post-enactment rationalization created for litigation. Beyond that, the fact that the evil had not come to pass during many years under a system that does not burden constitutional rights suggests that the new scheme is not a necessary or less restrictive alternative.

Moreover, even if the risk of confusion were a significant problem under the prior system, the 1977 Amendments fail to solve the problem. Instead, the new scheme simply moved that risk to the primary ballot, where it is

more, not less, of a problem. The primary ballot is inherently longer because it contains all of the potential nominees of the major parties, not just one for each. Because a candidate for a major party primary need not make any prior showing of support, there are often long lists of such candidates. In 1983, for example, there were 32 primary candidates for the senatorial nomination of the two major parties. Thus, the Washington statute fails to protect voters from any significant risk of confusion. Instead, it merely shifts any such risk to the crowded primary ballot, thereby imposing upon minor parties a very real risk that their right to appear on the general election ballot will be denied.

In Socialist Workers Party v. Secretary of State, the Michigan

Supreme Court found that a .3 percent primary vote validation requirement "is not necessary for, does not achieve, and is not even rationally related to the claimed state interests." 317 N.W.2d at 9. Where, as here, the means chosen does not serve the enunciated state interest, but does deny minor party adherents their right to vote and to associate politically in an effective way, the statute must fall on equal protection as well as speech and association grounds.

Even if the Washington statute were to serve the asserted governmental interest, it is not an essential means to that end and is far more burdensome, in theory and in practice, than alternative means. Other states have found ways to reasonably regulate access to the general election ballot without

adopting Washington's unique primary validation system which burdens First Amendment rights and imposes a disparate burden on minor parties. As the Court recently noted in exactly this context, "'[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'" Anderson, 460 U.S. at 806 (quoting NAACP v. Button, 371 U.S. at 438).

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals.

RESPECTFULLY SUBMITTED,

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APPENDIX A

APPENDIX A*

CANDIDATES FOR GOVERNOR
Washington State

Name	Party	Vote	Source
1896			
P.C. Sullivan	Republican	38,154	1
John R. Roger	Peoples Party	50,849	
R.E. Dunlap	Prohibition	2,542	
1900			
J.M. Frink	Republican	49,860	2
John R. Rogers	Democratic	52,049	
R.E. Dunlap	Prohibition	2,103	
William McCormick	Socialist Labor	843	
W.C. Randolph	Social Democratic	1,670	
1904			
Albert Mead	Republican	74,278	3
George Turner	Democratic	59,119	
William McCormick	Socialist Labor	1,070	
D. Burgess	Socialist	7,420	
Ambrosh Henry Sherwood	Prohibition	2,782	
1908			
Samuel G. Cosgrove	Republican	110,190	3
John Pattison	Democratic	58,126	
A.S. Caton	Prohibition	3,514	
George Boomer	Socialist	4,311	
1912			
M.E. Hay	Republican	96,629	4
Ernest Lister	Democratic	97,251	
Anna M. Maley	Socialist	37,155	
Abraham L. Brearcliff	Socialist Labor	1,369	
George F. Stivers	Prohibition	8,163	
Robert T. Hodge	Progressive	77,792	
1916			
Henry McBride	Republican	167,809	5
Ernest Lister	Democratic	181,645	
James E. Bradford	Progressive	2,894	

*Submitted as Appendix A to Brief of Appellants, Socialist Workers Party, in the Ninth Circuit Court of Appeals.

1920			
Louis F. Hart	Republican	210,662	6
W.W. Black	Democratic	66,079	
David Burgess	Socialist Labor	1,296	
Robert Bridges	Farmer-Labor	121,371	
1924			
Roland H. Hartley	Republican	220,162	7
Ben F. Hill	Democrat	126,447	
J.R. Oman	Farmer-Labor	40,073	
David Burgess	Socialist Labor	770	
Emil Hermann	Socialist	898	
William Gilmore	State Party	1,954	
1928			
Roland H. Hartley	Republican	281,991	8
Scott Bullit	Democrat	214,334	
James F. Skark	Socialist Labor	3,343	
Walter Price	Socialist	1,262	
Aaron Fyslerman	Workers Party	698	
1932			
John A. Gellatly	Republican	207,494	9
Clarence D. Martin	Democrat	353,215	
John F. McKay	Socialist	9,987	
Maslen Meade	Independent	378	
Edward Kriz	Socialist Labor	449	
L.C. Hicks	Liberty	47,710	
Fred E. Walker	Communist	2,532	
1936			
Clarence Martin	Democrat	466,550	10
Roland H. Hartley	Republican	189,141	
John F. McKay	Socialist	4,221	
Eugene Solie	Socialist Labor	466	
O.M. Nelson	Union	6,349	
Harold P. Brockway	Communist	1,939	
William M. Bouck	Farmer-Labor Commonwealth	1,994	
Malcolm M. Moore	Christian	1,947	
1940			
C.C. Dill	Democrat	386,706	10
Arthur B. Langlie	Republican	392,522	
P.J. Ater	Socialist Labor	426	
John Brockway	Communist	1,674	
1944			
Mon C. Wallgren	Democrat		3
Arthur B. Langlie	Republican		

Henry K.C. Gusey	Socialist Labor		
Allen Emmersen	Progressive		
1948			
Mon C. Wallgren	Democrat	417,035	11
Arthur B. Langlie	Republican	445,958	
Russell H. Fluent	Progressive	19,224	
Henry Killman	Socialist Labor	780	
Daniel Roberts	Socialist Workers	144	
1952			
Arthur B. Langlie	Republican	567,675	12
Hugh B. Mitchell	Democrat	510,657	
1956			
Emmett T. Anderson	Republican	508,122	13
Albert D. Rosellini	Democrat	616,987	-
Henry Killman	Socialist Labor	4,163	
1960			
Lloyd Andrews	Republican	594,122	13
Albert D. Rosellini	Democrat	611,987	
Henry Killman	Socialist Labor	8,647	
Jack Wright	Socialist Workers	992	
1964			
Daniel J. Evans	Republican	697,256	14
Albert D. Rosellini	Democrat	548,692	
Henry Killman	Socialist Labor	4,326	
1968			
John J. O'Connell	Democrat	560,262	14
Daniel J. Evans	Republican	692,378	
Ken Chriswell	Conservative	11,602	
Henry Killman	Socialist Labor	1,113	
1972			
Rosellini	Democrat	630,613	14
Evans	Republican	747,825	
Gould	Taxpayer$	86,843	
Killman	Socialist Labor	2,709	
David	Socialist Workers	4,552	
1976			
John D. Spellman	Republican	687,039	15
Dixy Lee Ray	Democrat	821,797	
Henry Killman	Socialist Labor	4,137	
Art Manning	American Independent	12,406	
Evelyn Olafson	U.S. Labor	1,364	
Red Kelly	O.W.L.	12,400	

Patricia Bethard	Socialist Workers	3,106	
Maurice Woodrow Willey, Jr.	Libertarian	4,133	
1980			
John Spellman	Republican	981,083	16
McDermott	Democrat	749,813	

Sources

1 Secretary of State Report 1893-6

2 Secretary of State 1899-1902

3 Abstract of Washington Territory and Washington State Votes 1865-1950

4 State of Washington, Abstract of Votes 1919-1914

5 State of Washington, Election Division Report 1913-1918

6 State of Washington, Election Division Biennial Report 1919-1922

7 State of Washington, Election Division Biennial Report 1923-24

8 State of Washington, Abstract of Votes General Election 1928

9 Washington State Abstract of Votes 1932, 1934

10 Washington State Secretary of State Abstract of Votes 1936-42

11 State of Washington Abstract of Votes 1948

12 State of Washington Official Abstract of Votes State General Election 1950-52

13 State of Washington Official Abstract of Votes State General Election 1954-62

14 State of Washington Abstract of Votes General Election 1964-74

15 State of Washington Abstract of Votes Primary and General Election 1976

16 State of Washington, Canvass of the Returns of the State of General Election 1980

NO. 85-656

In The

Supreme Court of the United States

October Term, 1985

Secretary of State of the State of Washington,
RALPH MUNRO,

Appellant,

vs.

SOCIALIST WORKERS PARTY, et al.

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE LIBERTARIAN PARTY OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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TABLE OF AUTHORITIES

Constitutional Provisions

State Statutes

Other Authorities

I. THE INTEREST OF AMICUS CURIAE

This case is of vital concern to the Libertarian Party of Washington ("the Party") which was formed in 1972 and has since participated in every election in the state.[1/] Until the 1980

1/ The Party is filing this brief in support of the position of Appellees. Both parties have consented to its filing and the consents are filed with the Court.

The Party is a state affiliate of the National Libertarian Party, which was formed in Colorado in 1971. The National Libertarian Party's history closely parallels that of its Washington state affiliate. The national party achieved steady increases in candidacies and voter support until the 1984 election, when increasingly burdensome ballot access laws crippled the Party's campaigns across the country.

Presidential Elec. Yr.	State Ballot Listings	Popular Votes
1972*	3	2,691
1976**	31	171,627
1980***	50	920,049
1984****	40	227,204

(Cont'd)

United States Senatorial campaign, the Party, like other "third" parties, was able to offer its candidates for statewide offices to the voters in the general election. For example, in 1976, the Party's candidate for the United States Senate, Richard K. Kenney, appeared on the general election ballot in November, pursuant to then applicable ballot access statutes which provided for third party nominations by convention, and for general election ballot

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Sources:

*Statistics of the Presidential and Congressional Election, (hereinafter "Statistics") of November 7, 1972, p. 52 (U.S.G.P.O. 1973);
**Statistics of November 2, 1976, p. 56, (U.S.G.P.O. 1977);
***Statistics of November 4, 1980, p. 72, (U.S.G.P.O. 1981); and
****Statistics of November 6, 1984, p. 69 (U.S.G.P.O. 1985).

Ths resulting ballot access cases are summarized at page 5 below.

access by voter certificates.[2]

In 1977, however, the Washington statutes were amended to include the one percent primary vote requirement that is now being complained of by the Socialist Workers Party ("SWP") in this case. In 1980, Richard K. Kenney was again the Party's candidate for U.S. Senator. Despite his personal qualities and prior experience as a candidate, and his diligence as a campaigner, Mr. Kenney was unable to appear as a candidate on the general election ballot because of the one percent requirement in the statute as amended in 1977.[3]

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[2] See Wash. Rev. Code §§ 29.24.020; 29.24.030; 29.24.040; 29.30.100 (1965) (amended 1977). See also Socialist Workers Party v. Secretary of State, 765 F.2d 1417, 1418 (9th Cir. 1985).

[3] The background of the 1980 Kenney campaign is set forth more fully in the Affidavit of Bonita L. Olson, attached hereto as Appendix "A."

Like the SWP, the Libertarian Party of Washington is also unquestionably a serious political party offering a thoughtful alternative to the two major parties' philosophies and candidates. As such, the Party has already been, and will likely continue to be, as directly affected as has the SWP by the restrictive ballot access statute involved in this appeal. Under the one percent requirement there may not be another statewide opportunity for the Party's candidates to educate and inform the voters about their views on the issues, the Party's philosophy and its differences from the major parties.

In this brief, the Party will present its experience and positions in regard to the Washington statute and its

damaging effects on the Party's operations and prospects. The Party - like the national Libertarian Party and other Libertarian Party affiliates across the country[4/] - must now seek and support judicial redress to confront this threat to its rights and the rights of the

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4/ The Libertarian National Committee filed a Brief amicus curiae in Anderson v. Celebrezze, 460 U.S. 780 (1983). Other Libertarian Party state affiliates have filed the following access cases: Bergland v. Harris, 767 F.2d 1551 (11th Cir. 1985); Libertarian Party v. Bond, 764 F.2d 538 (8th Cir. 1985); Libertarian Party v. Davis, 601 F. Supp. 522 (W.D. Ky. 1985); Libertarian Party v. Manchin, W.Va., 270 S.E.2d 634, appeal dismissed 449 U.S. 802 (1980); Libertarian Party of Alabama v. Wallace, 586 F.Supp. 399 (M.D. Ala. 1984); Libertarian Party of Florida v. State of Florida, 710 F.2d 790 (11th Cir. 1983); Libertarian Party of Nebraska v. Beerman, 598 F. Supp. 57 (D. Neb. 1984); Libertarian Party of Oklahoma v. Oklahoma State Election Board, 593 F. Supp. 118 (W.D. Ok. 1984); Libertarian Party of South Dakota v. Kundert, 579 F. Supp. 735 (D.S.D. 1984); Libertarian Party of Texas v. Fainter, 741 F.2d 728 (5th Cir. 1984); and Libertarian Party of Virginia v. Davis, 766 F.2d 865 (4th Cir. 1985) cert. den. 54 U.S.L.W. 3582 (U.S. Feb. 24, 1986) (No. 85-964).

voters.[5] The amicus Party and the SWP clearly have widely divergent political philosophies regarding the national economy, the proper role of government and the rights of the individual.[6]

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[5] Others have noted the resource draining effect of ballot access litigation. See e.g., Note, "The Supreme Court, 1982 Term," 97 Harv. L. Rev. 70, 163 (1983), citing Frampton, "Challenging Restrictive Ballot Access Laws on Behalf of the Independent Candidate, 10 N.Y. U. Rev. L. & Soc. Change 131, 133 (1981).

[6] See e.g., Appellee's Motion to Affirm or Dismiss, p. 5 n.2 regarding the philosophy of the SWP. The basic tenets of the Libertarian Party of Washington are:

STATEMENT OF PRINCIPLES

We, the members of the Libertarian Party, challenge the cult of the omnipotent state and defend the rights of the individual.

We hold that all individuals have the right to exercise sole dominion over their own lives, and have the right to live in whatever manner they choose, so long as they do not forcibly interfere with the equal right of others to live in whatever manner they choose.

Governments throughout history have regularly operated on the opposite principle, that the (Cont'd)

Whatever their philosophical and political differences, however, the interests

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State has the right to dispose of the lives of individuals and the fruits of their labor. Even within the United States, all political parties other than our own grant to government the right to regulate the lives of individuals and seize the fruits of their labor without their consent.

We, on the contrary, deny the right of any government to do these things, and hold that where governments exist, they must not violate the rights of any individual, namely, (1) the right to life - accordingly we support prohibition of the initiation of physical force against others; (2) the right to liberty of speech and action - accordingly we oppose all attempts by government to abridge the freedom of speech and press, as well as government censorship in any form; and (3) the right to property - accordingly we oppose all government interference with private property, such as confiscation, nationalization, and eminent domain, and support the prohibition of robbery, trespass, fraud, and misrepresentation.

Since governments, when instituted, must not violate individual rights, we oppose all interference by government in the areas of voluntary and contractual relations among individuals. People should not be forced to sacrifice their lives and property for the benefit of others. They should be left free by government to deal with one another as free traders, and the resultant economic system, the only one compatible with the protection of individual rights, is the free market.

of the amicus Party and the SWP are, for once, the same with regard to the constitutional protection of their fundamental rights to exist, to seek adherents and to have the opportunity to affect the course of political life in our society. This appeal represents a critical juncture on these issues for the future of the amicus Party, the SWP and all other third parties in the State of Washington, and likely in other states as well, should this statute be upheld.

II. SUMMARY OF ARGUMENT

This brief respectfully urges this Court to affirm the decision of the Court of Appeals holding Washington Rev. Code Ann. § 29.18.110 (West 1986) to be an unconstitutional burden on Appellees'

rights.

This Court and other authorities have long recognized the important functions performed by third parties in American politics, as forums for new ideas, and as release mechanisms for voters dissatisfied with the positions and candidates of the major parties. Point III. A.1.

Because of the critical importance of meaningful ballot access for the future survival of the third parties, this Court has protected the rights of third parties, such as those of Appellees and the amicus Party, and their voters' access to the ballot. Point III. A.2.

Under this Court's ballot access jurisprudence, the Court of Appeals properly analyzed the actual effects of

the Washington one percent requirement on third party candidacies and concluded that the requirement was unduly burdensome, due to its virtually complete exclusion of third party candidates from the Washington statewide ballot since 1977. Point III. B.

Similarly, the Court of Appeals properly concluded that, under this Court's "totality" rule, the Washington statutory scheme was also unconstitutionally burdensome because its early deadline - one of the earliest in the country - unfairly impacts on third party candidates who must be nominated before the major party candidates file or are finally nominated. Point III. C.

On these bases, this Court should now affirm the decision of the Court of Appeals in this case to ensure meaningful ballot access for third parties and their future ability to perform their important functions in our political system.

III. ARGUMENT

A. The Court of Appeals Properly Upheld the Appellees' Constitutionally Protected Right to Ballot Access in Statewide Elections

1. Third Parties Perform Important Functions in American Politics.

In the context of our emerging Republic, some of the Framers of the Constitution were concerned about ours becoming a political system dominated by two major parties.[7/] Others, however,

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7/ "The Supreme Court, 1982 Term," 97 Harv. L. Rev., 70 at 159, 161 n.37 (concerning James Madison). See also Note, "Better Late Than Never: The John Anderson Cases and the Constitutionality of Filing Deadlines," 11 Hofstra L.R., 691, 692 n.6 (concerning John Adams).

were concerned about excessive "factionalizing" or "splintering" of the political groups in our society.[8] This Court, and other authorities, have noted the history of these opposing concerns in the development of its ballot access jurisprudence.[9] In addition, the progressive "Short-Ballot" reform movement, and the subsequent reaction to its policies favoring broader ballot access, have also been noted as being relevant to the question of ballot access for third parties.[10] Both of these historical analyses are particularly relevant to this case because of the State of Washington's argued justifications for restricting ballot access.[11]

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[8] Id.

[9] See, e.g., Storer v. Brown, 415 U.S. 724, 735, 736 (1974).

[10] See, e.g., Lubin v. Panish, 415 U.S. 709, 712 (1974). See also Elder, "Access to the Ballot by Political Candidates." 18 Dick. L. Rev. 387, 389 (1979) (hereinafter "Elder").

Despite the Framers' concerns on both sides of the question, and notwithstanding the "Short Ballot" movement, third parties have long been part of American political life. Throughout our history, third parties have served a variety of useful purposes including providing forums for new, sometimes unpopular, ideas and by acting as "safety" or "release" mechanisms, particularly in times of great social and political stress.[12] More recently,

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[11] The State's arguments for the one percent requirement - demonstrating community support and lessening voter confusion - will be more fully discussed below.

[12] This Court and other authorities have long recognized these important functions of the third parties in American society. See e.g., (Cont'd)

third party "alternatives" have provided platforms focusing voter discontent with the major parties positions on national issues.13/ Without this so-called "safety valve," the "splintering" and "factionalization" that concerned some of the Framers is rather more likely to occur than not.14/ Ensuring third par-

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Sweezy v. New Hampshire, 354 U.S. 234, 250-1 (1957); Anderson v. Celebrezze, 460 U.S. 780, at 794 (1983) and the Brief amicus curiae of the American Civil Liberties Union in Anderson, App. 5A regarding the "safety valve" role of third parties. See also Elder. op. cit, at p. 392 ("release valve") and "Developments in the Law - Elections," 88 Harv. L. Rev. 1111, 1123 (1975) (third parties "perform important functions in the political process" and provide "an outlet for frustration.")

13/ See, e.g., Note, "Ballot Access Laws in West Virginia - A Call for Change," 87 W. Va. L. R., 809, 814 (1985).

14/ The recent developments in the Illinois Democratic primary provide a current example of this result. See Malcolm, "Stevenson Hopes to Run for Illinois Governor as Independent," N.Y. Times, A 16, March 28, 1986 and Malcolm, "LaRouche Illinois Drive Focused on Rural Areas," N.Y. Times, A 14, March 31, 1986. See (Cont'd)

ties real access to the ballot is, however, a necessary prerequisite to their continued functions as a means of fostering innovation and of ensuring peaceful, productive dissent.15/

2. Meaningful Ballot Access for Third Parties is Critical to their Survival and Warrants this Court's Protection.

In its opinion, the Court of Appeals correctly followed this Court's precedents in finding Washington Rev. Code section 29.18.110 (West 1985) unconstitutional as unduly burdensome on

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also, LaRouche v. Crowell, cert. denied, 54 U.S.L.W. 3582 (U.S. Mar. 3, 1986) (No. 85-1151).

15/ See Elder, op. cit, p. 392 ("If serious minor candidates representing such (new and unpopular) views were denied an electoral forum because they were precluded from placement on a ballot, then dissident pressure might explode in more destructive, less legitimate ways."). See also, Note, "The Supreme Court 1968 Term," 83 Harv. L. Rev. 60, 89 (1969) (third parties provide a "peaceful means to be heard").

the First and Fourteenth Amendment rights of the Appellees here. 765 F.2d at 1418. This Court's decisions on ballot access clearly support this finding by the Court of Appeals:

> In the present situation, the state laws place burdens on two different, although overlapping, kinds of rights - the rights of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.

Williams v. Rhodes, 393 U.S. 23, 30 (1968)

By carefully applying the analytic process established by this Court in

Anderson v. Celebrezze, 460 U.S. 780 (1983), the Court of Appeals properly concluded that the record in this case demonstrated "that Washington's ballot access law seriously impinged upon these protected rights" and that the state "had failed to present an interest substantial enough to warrant the restraint imposed on those rights." 765 F.2d at 1422. In reaching these conclusions, the Court of Appeals relied on Anderson and other ballot access decisions of this Court in a manner consistent with relevant decisions of other federal courts.16/ As noted, in its still-developing ballot access jurisprudence, this Court has emphasized both the associational and free choice aspects of these

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16/ See, e.g., Bergland v. Harris, 767 F.2d 1551 (11th Cir. 1985).

cases while basing its "conclusions directly on the First and Fourteenth Amendments." Anderson, 460 U.S. at 786 n.7. The Washington statutory scheme, by effectively denying ballot access to third parties, has particularly grave implications for such emerging parties. Access to the ballot is particularly critical to third parties as a means of "disseminating ideas"[17/] and, thus, to the future potential for such parties -

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17/ See, e.g., Illinois Election Bd. v. Socialist Workers Party, 440 U.S. 173, 186 ("an election campaign is a means of disseminating ideas as well as attaining political office.... Over-broad restrictions on ballot access jeopardize this form of political expression.") See also, "Developments in the Law - Elections," 88 Harv. L. Rev. 1111, 1123 (1975) ("Without this (third party) alternative, dissatisfied voters who find themselves repeatedly confronted with unattractive policies and candidates may come to doubt the legitimacy of the entire electoral process. It is therefore plain that the importance of independent and minor party candidates transcends their ability to capture electoral office.")

whatever the outcome of the instant elections involved. This concern is also consistent with this Court's own decisions on these issues:

> New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past.

Williams, 393 U.S. at 32.

Similarly, in Anderson, this Court noted this dissemination function of ballot access rights so critical to emerging parties:

> The exclusion of candidates also burdens voters' freedom of association because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens.

Anderson, 460 U.S. at 787-8. (emphasis added).

As the Court of Appeals found in this case, the Washington statutory scheme "deprives citizens of the opportunity to organize, campaign and vote outside the framework of the dominant political parties." 765 F.2d 1422 (emphasis added). All three activities in this process are directed toward the "basic incentive" of participation in the election of candidates. Thus, Washington's elimination of all real ballot access deprives its third parties "of much of the substance, if not the form, of their protected rights." Williams v. Rhodes, 393 U.S. at 41 (Harlan J., concurring). Without the present availability of such a "basic incentive" of participation, these parties may not have a future in the State of Washington.

On another issue of great relevance to third parties, in its ballot access jurisprudence this Court has also emphasized the fundamental nature of "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." Williams v. Rhodes, 393 U.S. at 30 (emphasis added).[18/] The right to vote, by itself, would be meaningless to adherents of third parties unless the laws also provide "voters the opportunity to vote for the candidates of their choosing." Bullock v. Carter, 405 U.S. 134 at 144 (1972).

18/ See also Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.")

Thus, the State of Washington, by merely granting the SWP and its voters the right to "organize, campaign and vote" in what is, for them, an essentially meaningless "blanket primary," has not satisfied even the rudiments of true ballot access. Clearly, this, at best, merely preliminary access to third party candidates by the voters "has diminished practical value if the party can be kept off the ballot." Williams v. Rhodes, 393 U.S. at 30 (1968). In other words, the voters of Washington seeking to express their preference at the polls for third party candidates in statewide contests since 1977 have indeed found that, with a sole exception in 9 years, their "vote may be cast only for major party candidates at a time when other parties ... are clamoring for

a place on the (statewide) ballot." Williams v. Rhodes, 393 U.S. at 31 (parenthetical added).

The Washington statutory scheme, by its almost total exclusion of third party candidates, violates one of the most basic tenets of true ballot access:

> It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues.

Lubin v. Panish, 415 U.S. 709, 716 (1974).

As this Court noted in Anderson, this near complete exclusion of any such alternative candidate surely justified the careful examination by the Court of Appeals.[19/] Clearly, by this Court's

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19/ See Anderson, 460 U.S. at 793, n.15 quoting, with approval, L. Tribe, American Constitutional Law, (1978) 774 ("But courts (Cont'd)

precedents, the State of Washington's statutory scheme - including the "totality of the so-called one percent requirement and the early deadline for third party candidates" - when viewed in toto vitiates the Appellees' ballot access rights completely.

B. The Court of Appeals Properly Found the Washington Statute's One Percent Requirement to be Unconstitutionally Burdensome As Applied

In making its determination that the one percent requirement was unconstitutionally burdensome, the Court of Appeals examined the record of state elections before and after the 1977 amendment adding the restriction.[20] In

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quite properly 'have more carefully appraised the fairness and openess of laws that determine which political groups can place any candidate of their choice on the ballot.'")

[20] 765 F.2d at 1419-20. This examination of (Cont'd)

its actual application, the one percent requirement fails to meet constitutional muster under any rubric or factual standard derived from this Court's and others' relevant ballot access precedents.

Despite the mass of data provided by the State - much of it irrelevant to the statewide election issue - even the State admits that only one third party candidate has appeared on the statewide ballot since 1977.[21]

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actual results is consistent with this Court's approach in Mandel v. Bradley, 432 U.S. 173, 178 (1977). See also Bergland v. Harris, 767 F.2d 1551, 1555 (11th Cir. 1985).

[21] This admission by the State appears in various forms:

> That success (in achieving the ballot) has been somewhat less with respect to statewide offices.

Juris. State., p. 6.

> (T]hey (the third parties) have not been successful at qualifying candidates for the state general election ballot for statewide offices, such as

(Cont'd)

Based on these statements and the Court of Appeals' own analysis, 765 F.2d 1419, the existence of an impermissible "freeze" on third party candidates in Washington is beyond argument.22/ By

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U.S. Senate."

Juris. State., p. 6 quoting the Affidavit of Supervisor of Elections, Donald F. Whiting, Ex. A, p. 5.

> Two candidates appeared on the (1984) general election ballot for statewide office, one being a minor party candidate and the other an independent.

Appellant's Brief, p. 9.

> To be sure, most of these (third party) candidates were running for positions which were elected in less than statewide areas. For statewide offices, minor party candidates have not done well since 1977.

Appellant's Brief, p. 22. (emphasis added) See also Appellee's Motion to Affirm or Dismiss, p. 8 ("(T)hrough 1984, only eight third party candidates even attempted to qualify, and seven of those were eliminated by the new restrictions.").

22/ Given that only one third party candidate in Washington has been permitted to appear on the statewide general ballot since 1977, the "blanket" primary and the one percent (Cont'd)

contrast, nothing that the State presented to the Court of Appeals or to this Court by way of justification can conceivably excuse the fact that third party candidates have been "substantially barred" from the Washington general election ballot since 1977 by the one percent requirement.23/

The State's main arguments below in

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requirement can also readily be described as "obstacles" (Williams v. Rhodes, 393 U.S. at 25, n.1) or an "entangling web" (Jenness v. Fortson, 403 U.S. 431, 437 (1971)) thus "chilling," (Anderson v. Mills, 664 F.2d 600, 609 (6th Cir. 1981)) "crippling" (Williams, 393 U.S. at 33), or "suffocating" (Jenness, 403 U.S. at 438) third party ballot access so as to make such access "virtually impossible" (Williams, 393 U.S. at 24) or "merely theoretical" (Jenness, 403 U.S. at 431). Similarly, the resulting exclusion of third party candidates can quite accurately be described as a "complete monopoly" (Williams, 393 U.S. at 32) by the two major parties which thus have a "decided advantage" over these newer parties (Williams, 393 U.S. at 31).

23/ 765 F.2d at 1419. See also 765 F.2d at 1421 ("Indeed, we can think of no state interest, and the authorities suggest none, that would necessitate the virtually complete exclusion of serious-minded minor parties seeking access to the ballot.").

attempting to justify its statutory scheme were merely repititions of two now familiar themes in ballot access cases: ensuring sufficient community support and preventing voter confusion. As the Court of Appeals noted, ensuring community support cannot by itself justify the one percent requirement for ballot access. 765 F.2d 1420. A denial of access can only be justified by furtherance of other legitimate state interest such as preventing voter confusion. Here, as the Court of Appeals found, there is no evidence of any such voter confusion which would justify the "substantial forclosure of minor parties from the general election ballot." 765 F.2d 1420.

In its Jurisdictional Statement and its Brief to this Court, the State repeats these themes, arguing first that "diligent" and "attractive" candidates

can and have met the one percent requirement "in congressional and local races," (Juris. State. p. 10) and then that "a reasonably diligent candidate, with a reasonably appealing campaign, can surely meet Washington's one percent requirement, as the history of minor party and independent candidates shows."24/ Appellant's Brief, p. 11. Again, the State is merely attempting to justify its own "draconian" solution to its perceived "voter confusion" by "counterarguing" about the lack of diligence or appeal of the third party candidates to save a system which has had only one minor party statewide candidate since 1977.25/ Here, the "remedy" far

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24/ See, on these issues, the Affidavit of Bonita L. Olson, attached hereto as App. A.

25/ Compare, Appellant's Brief, p. 22 ("(T)he 1977 change appears to have reduced the wide proliferation of minor party participation in November general elections .... And this is (Cont'd)

exceeded the perceived "problem".[26/]

As the State concedes, the Washington "blanket" primary and general elec-

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probably as the legislature intended.") With 765 F.2d at 1419 ("There is some indication that Washington's legislature simply underestimated the adverse impact of the statutory revision upon minor party access to the general election ballot.")

26/ In its Brief, at p. 19, n.10, the State also attempts to justify the one percent requirement by relying on the five percent minimum in the Federal Election Campaign Act as upheld by this Court in its opinion in Buckley v. Valeo, 424 U.S. 1, 96 (1976). This strained analogy - for that is all it is - is far from apt, however. This Court has noted the difference in kind between ballot access and public financing in comments just before the statements from Buckley quoted and relied on by the State:

> Accordingly, we conclude that public financing is generally less restrictive of access than the ballot-access regulations dealt with in prior cases. Buckley v. Valeo, 424 U.S. above at 95.

There is an obvious linkage between public financing and communication for the purpose of persuading voters. Clearly, however, without ballot access, all of this sought-after public financing and media communication is purposeless. See also, Elder, op. cit p. 387 ("Sufficient campaign funding for the purchase of vital mass media advertising before an election will mean little if a potential candidate cannot obtain a place on the ballot.")

tion system is actually a "two-step" process. Appellant's Brief, p. 19. In reality, the first part of the process now operates to "screen" (765 F.2d at 1421) out third party statewide candidates and the second part serves as a "runoff" between the two major parties. Such a system has the effect of eliminating all but the final traditional inter party rivalry between the two major parties.

This process is hardly the same "direct" primary system described in Storer v. Brown, 415 U.S. 724 (1978), the case from which the State has drawn only a partial quotation of this Court's description of a primary in opening its "Summary of Argument." Appellant's Brief, p. 9. Indeed, the next two sentences of the Storer quote raise ques-

tions about Washington's own use of the "primary" terminology for its September "first step" process:

> The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general ballot is reserved for major strugg les; it is not a forum for continuing intra party feuds.

Storer, 415 U.S. at 735. (emphasis added)

Thus, despite all of the State's attempts to describe this process as involving access to the "ballot" in the "primary" election, there is a serious question whether either term is really appropriate.[27/] Here, in the so-called

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27/ Indeed, at least one of the several definitional variants of "ballot" suggests the necessary connection between the word "ballot" and an actual election:

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"primary," nominated third party candidates are matched against typically many more major party candidates who are all still seeking their party's nominations,[28/] - hardly a "primary" as described above in Storer. Then, in addition to this "apples and oranges" quality, the State imposes a one percent

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> A slip of paper bearing the names of the offices to be filled at a particular election and the names of the candidates for whom the elector desires to vote. Black's Law Dictionary p. 182 (4th Ed. 1968).

Since the third party candidates are already nominated, the only "election" possible here for them is to be on the general election ballot.

28/ The detriment to the already-nominated third party candidates can best be expressed by quoting the Court of Appeals' decision, 765 F.2d at 1420 ("The primary ballot for the special election of the United States Senate in 1983 bore the names of 33 office seekers - 18 candidates from the Democratic Party, 14 candidates from the Republican Party, and the single nominee of the Socialist Workers Party.") The other effects of this disparity in the numbers and status of the candidates will be discussed more fully below.

cutoff before any candidate - even one chosen by his party - can be eligible to be actually elected on the only real ballot involved - i.e., the general election ballot. Here the State has wholeheartedly endorsed a hybrid "primary" election system that benefits the major parties by simultaneously eliminating already-nominated third party candidates and eliminating contesting candidates within the major parties, as do traditional "primaries" such as that described above in Storer.

It must be re-emphasized that the Washington statutory scheme is unique and anomalous in these respects, as the Court of Appeals noted. 765 F.2d at 1421.29/ Indeed, no other state statute

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29/ See 765 F.2d at 1421 for the Court of Appeals' discussion of Socialist Workers Party (Cont'd)

researched by amicus contains similarly restrictive provisions, even where so-called "open" primaries are statutorily mandated.30/ Surely, the concept of the states serving as "laboratories" does not excuse this kind of deviation from

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v. Secretary of State, 412 Mich. 571, 317 N.W.2d 1 (1982) and Hudler v. Austin, 419 F. Supp. 1002 (E.D. Mich. 1976), aff'd sub nom. Allen v. Austin, 430 U.S. 924 (1977) regarding the Michigan statute as being "similar in terms and exclusionary impact" and noting that the Michigan Supreme Court had held that statute unconstitutional "in light of the exclusion of minor parties from the general ballot in two subsequent elections."

30/ Only two states have "blanket primaries" and 9 have so-called "open primaries." See Tashjian v. Republican Party of Connecticut, prob. jur. ntd. 54 U.S.L.W. 448 (U.S. January 14, 1986) (No. 85-766), Brief of Appellant, pp. 57-58. In one state, Louisiana, the "blanket primary" may actually serve as an election if any candidate receives more than 50% of the total votes cast. If no one candidate receives more than 50%, the two highest votegetters are then "run-off" in the November election. See La. Rev. Stat. Ann. §§ 18:401, 511 (West 1986). Obviously, this Louisiana system bears more of a relationship to a real "ballot" because of the chance of actual election and the

constitutional norms. See Appellant's Brief at p. 13, n.9.

Despite the State's inapt analogies to Jenness v. Fortson, 403 U.S. 432 (1971) and American Party v. White, 415 U.S. 767 (1974), Appellant's Brief at 11, there can be no serious question that this Court's precedents guaranteeing third party ballot access are implicated by the exclusion of virtually all such candidates from statewide campaigns. Thus, the appellees and the amicus Party here can justifiably complain of the de facto monopoly of the Washington statewide general election ballot by the two major parties, whatever the original intent of the legislature.[31/]

C. The Court of Appeals Properly Held That, Viewed in its Totality, the Washington Statutory Scheme is Unconstitutionally Burdensome

As noted by the Court of Appeals, under this Court's "totality" test,[32/] the Washington statute is also unconstitutional because of the early deadline for third party nominations and resulting lack of opportunity for gathering support imposed by the statute only on

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irrelevance of any arbitrary percentage cutoff except the 50% needed to elect any candidate in the primary or, absent such a primary "winner," the two highest vote totals needed to run in the November election.

31/ This Court in Anderson noted the domination of the state legislatures by the two dominant parties. Anderson, 460 U.S. at 793, n. 16. The composition of the Washington State Legislature in 1977 - the date of passage of the one percent requirement - was as follows: Senate, 29 Democrats and 20 Republicans; House, 62 Democrats and 36 Republicans. Almanac of American Politics, p. 889 (1978).

32/ See, e.g., Williams v. Rhodes, 393 U.S. 23, 34 (1968); Anderson v. Celebrezze, 460 U.S. at 789 (1983).

the third parties. As the Court of Appeals noted:

> (A) primary vote system for measuring required public support for a minor party nominee has the inherent effect of establishing a relatively early deadline, preventing independent-minded voters who might be attracted to a minor party nominee from basing their choice on significant events as they develop in the course of a campaign.

765 F.2d at 1421.

In effect, then, the first step of the Washington statutory scheme, or so-called "primary," pits the already-nominated third party candidates for statewide office against candidates still seeking the nomination of the two major parties in September, well in advance of the general election. At that point, issues are still being focused and the candidates' positions on emerging issues

are still being established.[33] In this "blanket primary" arrangement, some voters may indeed favor one of the losing candidates of the major parties marginally at this stage, but subsequently would prefer one of the eliminated third party candidates over either

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[33] The effect of the earlier deadline on these statewide third party candidates is a state level version of the burden of early deadlines for national candidates described by this Court in Anderson, 460 U.S. at 80. As this Court also noted in Anderson, 460 U.S. at 785, n.5, regarding Mandel v. Bradley, 432 U.S. 172 (1977): "On remand, the District Court found that the early filing deadline imposed unconstitutional burdens on the plaintiff. Bradley v. Mandel, 449 F. Supp. 983, 986-989 (D. Md. 1978)." There, the District Court commented inter alia at 986, regarding the effects of an early deadline: "We find that the early filing date made it extremely difficult ... to attract coverage from the news media, both electronic and printed .... We find also that the early filing deadline unduly burdened Bradley's ability to raise money to finance his campaign.... The burdens placed on the Bradley campaign with respect to media coverage extended also to Bradley's efforts to make himself known by appearing before civic and other groups...."

of the major party candidates on the general election ballot. Having been preemptorily eliminated by their early nomination and resulting lack of support, the third party candidates never had a chance to be heard in a general election over the din of the major party candidates in the "primary."

In addition to the factors already noted by the Court of Appeals,[34/] as the

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34/ The Court of Appeals described the problem for third party candidates seeking public attention in this way: "(T)he focus of the primary is usually upon contested races between candidates for the nomination of the major parties, making it more difficult for the already nominated minor party office seeker to attract voter attention." 765 F.2d at 1421.

Similarly, in its decision overturning the Michigan primary percentage requirement - which, as noted above, is the closest precedent to this case - the Michigan Supreme Court emphasized the particularly burdensome effects of imposing such restrictions on ballot access at the primary election level:

This effect is heightened where, as
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attached affidavit of a Libertarian Party election campaign official notes, media access for candidates of third parties is quite difficult during the primary campaign and then improves significantly during the general election campaign.[35/] See, e.g., Anderson, 460 U.S. at 792. See also, Affidavit of

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here, restrictions on access work to eliminate political and ideological alternatives at the time major candidates are selected and before campaigning has identified and sharpened the issues effecting the electorate.

Socialist Workers Party v. Secretary of State, 412 Mich. 571, 317 N.W.2d 1, 6-7 (1982) (emphasis added)

Clearly, the same reasoning adopted by the Michigan Supreme Court is applicable to the Washington statute.

35/ The lack of public interest in the primary has already been noted by the Court of Appeals. 765 F.2d at 1421 ("Support may be drawn only from the limited group actually voting in the primary election.")

Bonita L. Olson, attached hereto as App. A. Cutting off ballot access before the general election, as the Washington statute does, thus even further reduces the third parties' ability to disseminate their ideas and to educate the voters on their alternate philosophies.36/

The early deadline for candidates clearly unfairly impacts on third party candidates on two levels - first, the third party nominating conventions come even before the major party candidate filing dates,37/ and second, the actual

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36 In addition, the public interest, media access, and ballot access problems of third party candidates may create fundraising problems, thus creating a vicious cycle. See Elder, op. cit. at p. 387.

37/ Compare Brief of Appellants, p. 6 ("The convention for minor party/independent nominations was rescheduled from the day of the primary to the Saturday before the filing (Cont'd)

choice of the third party nominees in July far precedes the final choice among the various major party nominees in September. Again, as with the virtually complete exclusion of third party candidates in statewide contests since 1977, the impact of the earlier dates falls

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period"), with Brief of Appellants at p. 21 ("The filing deadlines for minor party and independent candidates are approximately the same as for major party candidates; they are within the same week.") (emphasis added) In fact, the relevant part of the applicable statute, Wash. Rev. Code § 29.24.020, reads as follows: "Any nomination of a candidate for partisan public office by other than a major political party shall only be made either: (1) In a convention held the last Saturday immediately preceding the first day for filing declarations of candidacy specified in RCW 29.18.030 ...." Wash. Rev. Code 29.18.030, then provides, "The name of no candidate shall be printed upon the official ballot used at a state primary, unless not earlier than the last Monday of July nor later than the next succeeding Friday, a declaration of candidacy is filed in the form hereinafter set forth." Clearly, pursuant to these provisions, the third party candidates must be nominated a full week before the last day on which major party candidates are permitted merely to file for the primary.

only on the third party candidates. This unfair burden is precisely what this Court's ballot access precedents forbid. Anderson, 460 U.S. at 793.

In addition, the Washington statute does not fare well in a comparison with the deadlines for third party candidates in other states.[38/] Only seven have earlier deadlines for third party or independent presidential candidates than Washington.[39/]

38/ Ironically, it is just that early filing deadline for independents in Illinois that is likely to be an "obstacle" for Adlai Stevenson, III, the Democratic Party candidate for Governor in Illinois, who is now seeking to disassociate himself from his party's nominated candidates for lieutenant governor and secretary of state, as well as two downstate congressional nominations. According to news reports, Mr. Stevenson is planning to seek a legislative solution to the deadline or, failing that, to challenge it in court. See Malcolm, op. cit.

39/ The states' statutory provisions and (Cont'd)

The real issue with the early deadline, however, is that it, together with the "blanket primary" one percent requirement, operate "in tandem"[40/] to burden third party candidates unfairly

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deadlines for the only seven states with earlier deadlines than Washington are as follows:

State	Statute	1988 Deadline
KS	Kan. Stat. Ann. § 25-305 (1985)	June 10
ME	Me. Rev. Stat. Ann. tit. 21A § 354.8-A (1985)	June 14
NC	N.C. Gen. Stat. § 162-122 (1982)	June 24
IN	Ind. Code Ann. § 3 - 1 - 11 - 1 (West 1985)	July 1
FL	Fl. Stat. § 103.021(3) (West 1985)	July 15
OK	Ok. Stat. Ann. tit. 26 § 10-101.1 (West 1985)	July 15
TX	Tex. Code Ann. § 181.005(a), § 181.061(c) (Vernon 1986)	July 21

40/ See Storer v. Brown, 415 U.S. 724, 737 (1974).

and to preserve the "monopoly" of the two major parties in the State's elections and offices.

IV. CONCLUSION

For the reasons stated herein, the amicus Party respectfully urges this Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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Counsel gratefully acknowledge the assistance of J. Benedict Centifanti, Law Clerk, in the preparation of this brief.

Appendix

APPENDIX "A"
(original filed with the Court)

No. 85-656

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

SECRETARY OF STATE OF THE STATE
OF WASHINGTON, RALPH MUNRO,

APPELLANT,

v.

SOCIALIST WORKERS PARTY, et al.,

APPELLEES.

AFFIDAVIT OF BONITA L. OLSON

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1. I, the undersigned, am making this affidavit as part of the brief amicus curiae of the Libertarian Party of Washington in support of the Appellees in this case and for the position that Section 29.18.110 of the Revised Code of Washington, as applied to statwide third party candidates such as

those of Appellees or of the Libertarian Party, is unconstitutional.

2. I have personal knowledge of the facts set forth herein. I was campaign manager for Richard K. Kenney, Libertarian Party candidate for United States Senator for the State of Washington in 1980 until after the September primary, and I was campaign manager for Maurice Willey, Libertarian Party candidate for the Washington State Legislature, from the primary through the general election in 1980.

3. At the time of the 1980 U.S. Senate campaign, Richard K. Kenney was already a well-informed and experienced campaigner. He had already been the Libertarian Party candidate for the U.S. Senate in 1976 when he had polled 19,373 votes, or a total of 1.30% of the total vote for that office.

4. By the 1980 campaign, the Libertarian Party of Washington was much stronger and better organized than it had been in 1976, as indicated by its improved election results during the Presidential campaign that year in which the Libertarian Party Presidential candidate (Cont'd)

polled 29,213 votes as compared to only 5,042 votes in the 1976 election.

5. The 1980 Senatorial campaign for Richard K. Kenney was well organized on a statewide basis including, inter alia, the distribution of over 5,000 leaflets in July, August and September, 1980 by three teams of six people each across the state. A copy of that pamphlet is attached hereto and incorporated as Exhibit A.

6. Throughout the primary campaign in July, August, and September, press releases about the Richard K. Kenney campaign were sent out to every major television and radio station in the state and to most of the daily newspapers across the state.

7. During August and September, 1980, Richard K. Kenney toured the state speaking to local groups, giving press conferences and granting interviews to the media whenever they attended his briefings.

8. Prior to the primary in September, 1980 I personally found it to be very difficult to attract adequate press coverage for the Kenney campaign, despite his excellent qualities as a candidate and public speaker, because of a general lack of media and public interest in the primary campaign.

9. Although he was an experienced and charismatic candidate who diligently campaigned with well-organized support, Richard K. Kenney was not able to obtain the newly required 1% of the total vote case in the primary for the office of U.S. Senator in 1980 as he had in 1976, and therefore his name did not appear on the general election ballot to the detriment of the support for the Libertarian Party's other candidates.

10. After the primary, when I served as campaign manager for Maurice Willey in the general election, media representatives actively sought press coverage of the Libertarian Party candidate and the public interest in the election increased significantly.

11. Because of the 1% requirement and the time and effort expended in the 1980 campaign for Richard K. Kenney, the Libertarian Party of Washington has never again tried to qualify another statewide candidate for U.S. Senator or Governor of Washington.

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BONITA L. OLSON

Signed and sworn to before me on April 7, 1986 by Bonita L. Olson.

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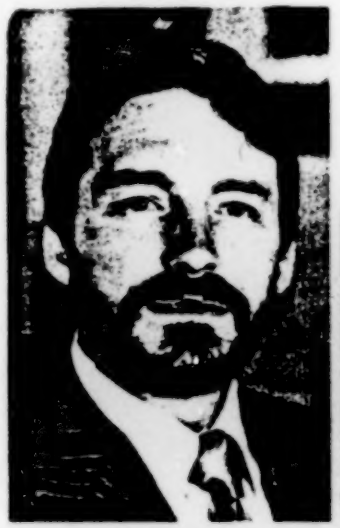
Catherine G. Brumbaugh
Notary Public
State of Washington

My Commission Expires: 12/30/89

Exhibit A.



RICHARD KENNEY FOR SENATE

Joining Ed Clark in presenting the Libertarian alternative to Washington voters is Rich Kenney, candidate for U.S. Senate.

A message from Rich Kenney to the people of Washington:

"Libertarian positions are based on the belief that all individuals have the right to live their lives in any way that's peaceful. A similar view inspired the founding of our country, a view best expressed by Jefferson's Declaration of Independence.

"But today we suffocate under intrusive, oppressive laws and regulations. Both at home and abroad, the American government has become a danger to, rather than a protector of, liberty and life. With other Libertarians, I propose a fundamental change in government, away from paternalistic interference and toward respect for and defense of individual rights.

"Libertarian foreign policy emphasizes the need for providing adequate defenses against attack and for limiting the activity of our military to strictly defensive measures. This means we would not go to war simply because our standard of living was threatened by a politically caused rise in the price of middle east oil.

"Libertarian domestic policy emphasizes both civil liberties and economic freedoms, which means an end to harassment of those whose only 'crime' is being different and an end to the innumerable restrictions upon mutual exchange and to privileges some firms are awarded over others.

"A Libertarian elected to the Senate means a consistent champion of peace and freedom."

WASHINGTON'S ALTERNATIVE IN 1980